Supreme Court, U.S.
FILED

02 643 OCT - 7 2002

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No.

In the

Supreme Court of the United States

MARY FLAHERTY,

Petitioner,

v.

METROMAIL CORPORATION, EXPERIAN CORPORATION, EXPERIAN INFORMATION SOLUTIONS, INC., and EXPERIAN HOLDINGS, as successors in interest to METROMAIL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I Whether a plaintiff in a case of constructive discharge is required to prove that the employer deliberately intended by its conduct to create intolerable working conditions to cause her to resign or is it sufficient for the plaintiff to prove that the working conditions were such that a reasonable person would have felt compelled to resign.

II Whether a plaintiff in a constructive discharge case is held to a higher standard of proof than that articulated in *McDonnell Douglas* and *Hicks* and is required to establish a *prima facie* case by direct evidence of discrimination.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit from which this petition is made is unreported. The opinion of the United States District Court for the Southern District of New York is also unreported. A prior opinion of the United States Court of Appeals for the Second Circuit is reported at 235 F.3d 133 (2d Cir. 2000). The opinion of the District Court from which the first appeal was taken is also unreported.

STATEMENT OF JURISDICTION

Petitioner filed her Complaint seeking damages for alleged violations of 29 U.S.C. 623 and 42 U.S.C. 2000e in the United States District Court for the Southern District of New York. The District Court dismissed the case on statute of limitations grounds on March 21, 2000.

Appeal was taken by petitioner to the United States Court of Appeals for the Second Circuit. The Court of Appeals vacated the judgment of the District Court on December 19, 2000 and remanded the case to the District Court.

On remand the District Court granted summary judgment in favor of respondents on petitioner's claims of constructive discharge, on July 31, 2001. Petitioner filed a timely appeal with respect to the case on the merits of her claim.

On July 9, 2002, the Second Circuit issued its opinion affirming the District Court. No petition for rehearing was filed.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case asserts constructive discharge as a result of stereotypes which pertained only to older women in the

workplace. As such the case involves both the Age Discrimination In Employment Act of 1973, 29 U.S.C. §621 *et seq.*, which states:

> It shall be unlawful for an employer – (1) . . . to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age...

and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which states:

> It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Petitioner, Mary Flaherty, now 63, was employed by respondent Metromail, a direct marketing company for twenty years from 1977 until November 1, 1997. (JA 93-95, 440, 460, 485-487).[1] She was initially hired as a secretary to Joseph Dikdan who promoted her to account manager in 1982. (JA 93-95, 440, 486-487). Ms. Flaherty first experienced age and gender discrimination at Metromail in 1992 when her supervisor Rick Lane expressed sexist and ageist views and pressured Ms. Flaherty, then age 55, to retire. (JA 473, 543-548). Mr. Lane transferred several of Ms. Flaherty's large accounts to male account executives (JA 109-120, 547), including a transfer of Ms. Flaherty's Doubleday account to Nick Fariella, a male account executive who was the same age as Ms. Flaherty. (JA 82, 444, 555). In 1993 Mr. Lane was replaced by Mac Rogers, who was succeeded by Beth Hurwitz in1995. (JA 81, 236-237, 283-284, 440, 544-549).

In 1995, Ms. Flaherty again experienced age and gender discrimination. In 1995, Senior Vice-President Mike Reynolds told Ms. Hurwitz that Ms. Flaherty was "old" and "grandmotherly" and "at the end of her career". (JA 99-101, 549-551, 571). Ms. Hurwitz was not permitted to transfer accounts to Ms. Flaherty and Mr. Reynolds directed Ms. Hurwitz to terminate Ms. Flaherty. (JA 100-101, 473-474). Ms. Hurwitz refused to carry out Mr. Reynolds' orders and told Ms. Flaherty she was transferred to another division as a result. (JA100-101, 473-474).

In 1996, Ms. Hurwitz was succeeded by Sam Cardonsky. Mr. Cardonsky was given the same directive by Mr. Reynolds to terminate plaintiff (JA 480) or as Mr. Cardonsky put it "to get rid of the old bag". (JA 254, 489). Other senior executives at Metromail shared this age and gender related animus and Mr.

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[1]JA references in the Statement of the Case are to the Joint Appendix filed in the Second Circuit below. Many of the facts are referenced in the Second Circuit opinions below.

Cardonsky talked openly to other executives of this plan. (JA 254, 488-489).

In August, 1996, as part of this plan, Mr. Cardonsky issued a warning letter which stated that failure to meet her budget by year-end could be grounds for separation. (JA 325). Although the warning letter was also issued to other account managers, the circumstances were not comparable. When Mr. Cardonsky gave her the letter, he did so in a meeting with a Human Resources representative present who pressured Ms. Flaherty to take a lower paying position in the catalogue division (JA 128, 475, 497-498, 502, 535, 565, 611, 759, 764) and on the same day Mr. Cardonsky told one of the younger male account executives that he could have Ms. Flaherty's accounts. (JA 568, 759).

In December 1996, Mr. Cardonsky assigned two accounts, one to Mr. Fariella and another to a younger male executive. No accounts were assigned to Ms. Flaherty. (JA 158-160, 175-176, 184, 214-218, 221-223, 534). Mr. Cardonsky admitted that he gave a new account to Mr. Fariella because Doubleday, the account that had previously been taken from Ms. Flaherty, had demanded that Mr. Fariella be removed from the account and he wanted to replace Mr. Fariella's loss of that account. (JA 214-216, 219, 534).

In January 1997, Mr. Cardonsky was terminated and was replaced by Mr. Kaiser who was a protégé of Mr. Reynolds. (JA 300, 503-504, 508, 516). When Mr. Kaiser took over he discussed Ms. Flaherty on at least two occasions with Mr. Cardonsky. During those conversations, Mr. Cardonsky warned Mr. Kaiser "to go slow" and that before he took any action he should consider "organizational politics." (JA 511-512, 515-516).

While Ms. Flaherty initially hoped that the situation would improve under Mr. Kaiser, it did not. Mr. Kaiser, in fact, continued the same conduct that had existed under Mr. Cardonsky. While the Court below focused on the fact that Ms. Flaherty had no direct evidence of discriminatory

statements made by Mr. Kaiser (27a), there was evidence in the record that she certainly witnessed Mr. Kaiser's differential treatment of the male account executives as compared to Ms. Flaherty. (JA 179-180, 184-185, 261-262, 263, 524, 594-599). Most troublesome was how Mr. Kaiser handled the Doubleday account in February, 1997. Initially he attempted to convince Doubleday to keep Mr. Fariella. (JA 266). When Doubleday refused, Mr. Kaiser assigned the account to a younger female executive (JA 228, 530, 533, 590, 759), even though both Doubleday and the internal person at Metromail who dealt with the account had requested that Ms. Flaherty be assigned to the account. (JA 176, 266-268, 271-272, 525-528). Ms. Flaherty contends that the subjective reasons Mr. Kaiser gave at his deposition for not assigning this lucrative account to her were pretextual. (JA 268-269, 589-590).

When Mr. Kaiser repeatedly failed to meet with one of Ms. Flaherty's significant accounts and then stood her up without cancelling a scheduled meeting, Ms. Flaherty concluded that nothing had changed and that she could not tolerate the existing conditions any longer since she was becoming increasingly ill from the stress with bouts of nausea, fainting and dizziness. (JA 177, 179-180, 188). She then concluded that she had no choice but to take early retirement and so advised Mr. Kaiser. (JA 177-179, 188-189, 194, 196, 205). While the Second Circuit agreed that Ms. Flaherty's retirement was no bar to her claim of constructive discharge (29a-30a), it found that her claim should be dismissed.

> We affirm the dismissal of her complaint on the ground that she fails to raise a disputed issue of material fact regarding the presence of objectively intolerable working conditions deliberately created by her employer at the time of her resignation. Flaherty conceded that, to her knowledge, Kaiser had never made a discriminatory remark to or about her. And the conduct that Flaherty proffers as evidence of Kaiser's deliberate efforts to compel her to resign is inadequate to establish a *prima facie* case that her

> work environment was intolerable and that Kaiser was engaged in intentional efforts to compel her to resign. Any past discrimination she allegedly experienced under her earlier supervisors is not, in the particular circumstances of this case, sufficiently linked to working conditions under Kaiser to support a constructive discharge claim, since the earlier supervisors had left the company and no longer dealt either with the plaintiff or with Kaiser. (30a).

It is this finding by the lower Court which is at the core of this Petition at bar.

REASONS FOR GRANTING THE WRIT

I

THERE IS A DIRECT CONFLICT AMONG THE CIRCUITS ON THE QUESTION OF WHETHER A PLAINTIFF CLAIMING CONSTRUCTIVE DISCHARGE MUST PROVE THAT THE EMPLOYER DELIBERATELY INTENDED TO FORCE HER RESIGNATION

The constructive discharge doctrine recognizes that an employer should not be able to accomplish indirectly what the law prohibits being done directly and that an employer is equally liable for creating intolerable conditions which would compel an employee to resign as it would be for directly discharging the employee. See 1 Barbara Lindemann and Paul Grossman, *Employment Discrimination Law* 839 (3rd ed. 1996). While the Supreme Court recognized the doctrine in *Sure-Tan Inc. v. N.L.R.B.*, 467 U.S. 883, 894 (1984), the Court, however, has never squarely addressed the constructive discharge doctrine in context of the discrimination laws. Although several cases which involved constructive discharge under the discrimination law, such as *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) have reached this Court, they have each been decided on other grounds, and the precise issue as raised in this case was not before the Court.

While every Circuit recognizes the doctrine, the Courts below have diverged in significant respects and the Circuit Courts are in disarray as to the applicable standard of proof which a plaintiff in a constructive discharge case under Title VII or the ADEA must bear. Without clear guidance from this Court, a plaintiff's ability to prevail in a constructive discharge case is entirely dependent on the particular Circuit in which the case is brought. This conflict is commented on by the Courts below and by legal commentators. See *Ramos v. Davis & Geck, Inc.*, 167 F.3d 727, 732, n. 4 (1st Cir. 1999);

Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1354 (4th Cir. 1995); *Schafer v. Bd. of Public Educ. of the School Dist. of Pittsburgh, Pa.*, 903 F.2d 243, 248-249 (3rd Cir. 1990); *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 343 (10th Cir. 1986); and Lindemann and Grossman, *supra*, at 838-846; Stacey Elizabeth Tjon Aasland, Case Comment, *Civil Rights -- The Constructive Discharge Doctrine and Its Applicability To Sexual Harassment Cases: Does It Matter What The Employer Intended Anymore*?, 71 N. D. L. Rev. 1067, 1073-1074 (1995); Mark S. Kende, *Deconstructing Constructive Discharge Standards in Employment Discrimination Remedies*, 71 Notre Dame L. Rev. 39, 52 (1995); Sheila Finnegan, Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U. Chi. L. Rev. 561, 562 (1986); and Martin W. O'Toole, *Choosing a Standard for Constructive Discharge in Title VII Litigation*, 71 Cornell L. Rev. 587, 588 (1986).

There are at least two divergent standards followed by the Courts below. The majority of the Circuits adhere to a purely objective test, which requires that plaintiff show that a "reasonable person" would have felt compelled to resign under the circumstances. This test is recognized in the First, Third, Fifth, Seventh, Ninth, Tenth and Eleventh Circuits. See e.g. *Ramos v. Davis & Geck, Inc.*, 167 F.3d 727, 732 (1st Cir. 1999); *Calhoun v. Acme Cleveland Corp.*, 798 F.2d 559, 561 (1st Cir. 1986); *Duffy v. Paper Magic Group*, 265 F.3d 163, 167-168 (3rd Cir. 2001); *Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227, 1230 (3d Cir. 1988); *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 887-888 (3d Cir. 1984); *McCann v. Litton Systems, Inc.* 986 F.2d 946, 951 (5th Cir. 1993); *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980); *EEOC v. University of Chicago Hospitals*, 276 F.3d 326, 332 (7th Cir. 2002); *Draper v. Couer Rochester, Inc.*, 147 F.3d 1104, 1110 (9th Cir. 1998); *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987); *Heno v. Sprint/United Management Co.*, 208 F.3d 847, 858 (10th Cir. 2000); *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 343 (10th Cir. 1986); *Doe v. Dekalb County School District*, 145 F.3d 1441, 1450 (11th Cir. 1998); *Wilson v. S&L Acquisition Co. L.P.*, 940 F.2d 1429,

1436 (11th Cir. 1991); *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987).

A minority of the Circuits, including the Second Circuit where this case arose, require an additional element that the plaintiff prove deliberate intent. See *Stetson v. NYNEX Service Co.*, 995 F.2d 355, 361 (2d Cir. 1993); *Spence v. Maryland Casualty Co.*, 995 F.2d 1147, 1156 (2d Cir. 1993). The Fourth, Sixth, Eighth and D.C. Circuits also adopt the deliberate intent standard. *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1354 (4th Cir. 1995); *Moore v. KUKA Welding Systems & Robot Corp.*, 171 F.3d 1073, 1080 (6th Cir. 1999); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987); *Jaros v. LodgeNet Entertainment Corp.*, 294 F.3d 960, 965 (8th Cir. 2002); *Tork v. St. Luke's Hospital*, 181 F.3d 918, 919 (8th Cir. 1999); *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1558 (D.C. Cir. 1997); *Katradis v. Dav-El of Washington, D.C.*, 846 F.2d 1482, 1485 (D.C. Cir. 1988).

Further, even within the two principal standards there are multiple variations which a number of the Circuits have adopted. Thus, the Sixth and Eighth Circuits have adopted a two prong test which focuses instead on the foreseeability that the employer's conduct will cause the plaintiff to resign and the D.C. Circuit focuses on "aggravating factors," such as a continuous and severe pattern of discrimination. *Yates*, 819 F.2d at 637; *Jaros*, 294 F.3d at 965-966; and *Mungin*, 116 F.3d at 1558.

The anomaly of the conflict in the Circuits is most evident in this case involving a multi-state corporation. Had petitioner brought her case in the Seventh Circuit, where respondents' headquarters were located,[2] as opposed to the Second Circuit, a reasonable person standard would have been applied, and petitioner would have not had to have establish the deliberate intent required by the Court below.

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[2]Metromail was headquartered in Lombard, Illinois and both Mr. Reynolds and Mr. Kaiser were based in Illinois. (JA 64, 85, 287).

In view of this Court's previous rulings with regard to the standard to be applied in discrimination cases, the appropriate standard that should be implied on constructive discharge is that of a "reasonable person" as adopted by a majority of the Circuits. See Finnegan, *supra*, at 563, 575-580; O'Toole, *supra*, at 616. This standard comports with other decisions of this Court in the context of the discrimination laws. See *Harris*, 510 U.S. at 22. As noted by Justice Scalia, concurring in *Harris*, "[t]oday's opinion elaborates that the challenged conduct must be severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive." 510 U.S. at 24 (Scalia, J. concurring). Justice Ginsberg, also concurring in *Harris*, directly addressed the issue of constructive discharge and noted "[i]t suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered the working conditions as to make it difficult to do the job." *Id.* at 25. (Ginsberg, J. concurring).

Nor does the minority "deliberate intent" standard further the make-whole policy of the discrimination laws as articulated by this Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421-422 (1975). In the context of constructive discharge the additional burden imposed by the deliberate intent standard contravenes this purpose by shielding employers from back-pay liability despite working conditions that are intolerably discriminatory in violation of Title VII or the ADEA. Further, the requirement of deliberate intent is inconsistent with the constructive discharge doctrine itself which is to protect employees from conditions so unreasonably harsh that a reasonable person would feel compelled to leave the job, and to hold employers accountable for creating such intolerable working conditions. *Ramos v. Davis & Geck, Inc.*, 167 F.3d at 732.

The Second Circuit dismissed petitioner's case on summary judgment because it concluded she had not proved "the presence of objectively intolerable working conditions deliberately created by her employer at the time of her

resignation." (30a). Had the Second Circuit applied the correct standard, that of a "reasonable person," petitioner would have been entitled to take her case to a jury. This case has clear evidence in the record of adverse decisions which were made concerning petitioner's employment and of intent to get rid of her based on age and gender stereotypes. Petitioner should have had the opportunity to show that a reasonable person in her shoes would have considered the conditions which continued under her last supervisor to have been infected by this same discrimination and were objectively intolerable.

Constructive discharge presents a significant issue, the importance of which has become more so in recent years. The Third Circuit recognized that in the last decade, in constructive discharge and other discrimination cases, would-be violators of discrimination laws have become "educated" and "sophisticated" and have learned to mask discrimination in more subtle forms. *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-1082 (3d Cir. 1996). Moreover, legal commentators have noted that there has been a proliferation of constructive discharge cases. Lindemann and Grossman, *supra*, at 839; Kende, *supra*, at 43, n. 21. A Westlaw search in the Federal Courts revealed that there has been a substantial number of opinions written on this issue, including more than four hundred and fifty in the Circuit and district courts, since 2000.[3] Given the significance of this issue, the Court should grant certiorari to resolve the divergent analyses among the Circuit Courts of Appeals with regard to the applicable standard of proof which a plaintiff in a constructive discharge case must prove.

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[3]This data was collected from a Westlaw search conducted October 1, 2002 in the United States Federal Courts database using the following search terms: constructive /s discharge & da(2000, 2001, 2002).

II

THE DECISION BELOW IS IN DIRECT CONFLICT WITH APPLICABLE SUPREME COURT PRECEDENT WHICH DOES NOT REQUIRE DIRECT EVIDENCE OF THE EMPLOYER'S INTENT

Besides the split in the circuits, this Court should also review this case since the Second Circuit has introduced an additional burden in a constructive discharge case that the plaintiff offer direct evidence of the employer's intent. This approach of the Second Circuit requiring direct evidence of intent is inconsistent with the indirect evidence method of proof adopted by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803 (1973), and followed in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-254 (1981), and *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978), *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510-511 (1993).

The theory underlying *McDonnell Douglas* and its progeny is the basic recognition that an employer in an employment discrimination case will not ordinarily admit employment discrimination. Because of the unavailability of direct evidence, this Court formulated the three step burden-shifting method of proof based on indirect or circumstantial evidence and which holds direct evidence of discriminatory intent is not required. The Second Circuit requirement of direct evidence of intent in this case on the issue of constructive discharge cannot be reconciled with the *McDonnell Douglas* analysis, or that of *Hicks*.

The approach of the Second Circuit, which requires that the plaintiff produce direct evidence of discriminatory intent at the *prima facie* stage is also inconsistent with and cannot be reconciled with this Court's articulation of what is required at that stage. In *Burdine*, this Court explained the plaintiff's burden at the *prima facie* stage as not onerous. Further, as *Burdine* makes clear, this Court has never equated a *prima facie* case with a requirement of direct evidence. Instead, as

explained in *Burdine* and *Furnco* the *prima facie* case raises a rebuttable presumption that the employer discriminated against the plaintiff and the plaintiff's only burden at the *prima facie* stage is to set forth evidence adequate to raise an inference of discrimination. See also *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984).

As the *Furnco* Court explained, *McDonnell Douglas* makes clear that a Title VII [or ADEA] plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remained unexplained, that it is more likely than not that such actions were based on a discriminatory criterion under the Act. *Furnco* also directs that the Courts below are not to confuse the plaintiff's *prima facie* case with the ultimate finding of fact. 438 U.S. at 576, 579-580.

The Second Circuit's requirement of direct evidence on its *prima facie* case is not only wrong under *McDonnell Douglas* and its progeny but it also disregards this Court's holdings under *Hicks*, 509 U.S. at 511 and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146-147 (2000). *Hicks* and *Reeves* squarely hold that direct evidence is not a necessary element of the plaintiff's case at any stage. *Hicks* also squarely rejects the sort of heightened burden at the *prima facie* stage which the Second Circuit required below. Justice Scalia described this sort of heightened burden as a degree of proof so high that it would compel a directed verdict for the plaintiff. *Hicks*, 509 U.S. at 515. Because the Second Circuit below constructed this artificially high barrier, the Court foreclosed consideration of the pretext evidence in the record which together with the *prima facie* case could have permitted the trier of fact to draw the ultimate inference that the decisions made by petitioner's supervisor at the time of her resignation were the product of intentional discrimination.

There is simply no basis to require a plaintiff in a constructive discharge case to have a more onerous burden of proof to

establish discrimination than a plaintiff in other Title VII or ADEA cases. The same rationale enunciated in *Hicks* and *Reeves* is equally applicable to a constructive discharge case. The only additional factor in such a case is whether the working conditions had become so intolerable so as to justify an employee's resignation. Whether the employer terminated the employee because of discriminatory animus or forced her resignation because of discriminatory animus, the same standard of proof should apply.

Finally, this Court should review the decision of the Second Circuit as to the scope of the evidence which is subject to consideration in a constructive discharge case. Contrary to the dictates of this Court in *Anderson v. Liberty Lobby, Inc.*, that the courts on summary judgment must accord all reasonable inferences to the non-movant and are not to weigh the evidence, the Court below excluded direct evidence of age and gender based animus by prior supervisors who had input into this decision-making process who had determined to "get rid" of the petitioner, and prior discriminatory conduct which was calculated to force her to resign. *Anderson v. Liberty Lobby, Inc.*, 480 U.S. 903 (1987). Thus, the Court below determined as a matter of law that there was insufficient linkage because those supervisors had left the company by the time petitioner resigned. The exclusion of such evidence on summary judgment is in direct conflict with decisions of other Circuits which have considered such input. Thus both the Fourth and Seventh Circuits have held that input from former supervisors may infect the decision-making process and that the exclusion of such evidence on summary judgment denied the non-movant of all permissible inferences. *Tuck v. Henkel Corp.*, 973 F.2d 371, 373, 376-377 (4th Cir. 1992), *cert. denied*, 507 U.S. 918 (1993); *Dey v. Colt Construction & Development Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail the end of each document.)
Docket No. 00-7467

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARY FLAHERTY,
Plaintiff-Appellant,

v.

METROMAIL CORPORATION, EXPERIAN CORPORATION, EXPERIAN INFORMATION SOLUTIONS, INC. and EXPERIAN HOLDINGS, INC., as successors in interest to Metromail Corporation, Defendants-Appellees.

October 25, 2000, Argued

December 19, 2000, Decided

COUNSEL:
JANET C. NESCHIS, McLaughlin & Stern, New York, New York, (Steven J. Hyman and Deanna R. Waldron, on the brief), for plaintiff-appellant.

ROBERT N. HOLTZMAN, Kramer Levin Naftalis & Frankel LLP, New York, New York (Kevin B. Leblang and Stephen M. Knecht, of counsel), for defendants-appellees.

JUDGES:
Before: MINER and SACK, Circuit Judges, and RAGGI, District Judge. *

OPINIONBY:
MINER

OPINION:
MINER, Circuit Judge:

Plaintiff-appellant Mary Flaherty appeals from a summary judgment entered in favor of defendant-appellee Metromail Corporation ("Metromail"), and its alleged successors in interest, defendants-appellees Experian Corporation, Experian Information Solutions, Inc., and Experian Holdings, Inc. (collectively "Experian"), in the United States District Court for the Southern District of New York (Buchwald, J.). The action giving rise to this appeal was instituted by Flaherty to recover damages arising from her constructive discharge from employment as a consequence of gender and age discrimination and was dismissed by the district court as time-barred. The district court identified the date of accrual of Flaherty's claim as the point in time when Flaherty was given definite notice of her impending termination. The district court concluded that this point was reached, at the latest, on the date Flaherty received a warning letter following a series of allegedly discriminatory acts on the part of supervisory personnel at Metromail.

BACKGROUND

Metromail is a direct marketing company that sells lists of names to customers (list services), creates master lists for customers with deletion of duplicate names (list enhancement or merge/purge services), and performs mailing services for its customers (lettershop services). Flaherty, a 61 year-old female, began working for Metromail Corporation in 1977 as secretary to Joseph Dikdan. In 1982, Flaherty was made an account manager and full-time sales person in Metromail's East Coast Sales Office.

During Flaherty's tenure at Metromail, she reported to a series of supervisors: (1) Dikdan from 1977, when she was hired, until roughly 1990; (2) Rick Lane from 1990, until his departure in 1993; (3) Mac Rodgers from 1993 through 1995; (4) Beth Hurwitz from 1995 through the middle of 1996, when Hurwitz was transferred; (5) Sam Cardonsky from mid-1996 until February 1997; and (6) James Kaiser from February 1997, until plaintiff's resignation, effective November 1997. Her supervisors, including Lane, Rodgers, Hurwitz, and Cardonsky, reported to Senior Vice-President Mike Reynolds, who was appointed to that position in 1995. Allegedly,

Reynolds commenced a campaign to terminate Flaherty's employment.

Flaherty claims she first experienced gender and age discrimination at Metromail in 1993 when her supervisor, then Lane, allegedly expressed his sexist and ageist views to her. According to Flaherty, Lane repeatedly told her that: (1) women did not belong in the workplace; (2) women should be "barefoot and pregnant"; and (3) he would never play golf with a woman. He consistently asked Flaherty, then age 55, when she would retire and suggested that she did not need to work because her husband could support her. Thereafter, Lane caused several of Flaherty's largest accounts to be transferred to male account managers. In 1993, Lane was replaced by Rodgers, who was then succeeded by Hurwitz in 1995.

Flaherty alleges that discrimination at Metromail continued after Lane left the company. Sometime in 1995, Senior Vice-President Reynolds supposedly told Hurwitz, Flaherty's supervisor at the time, that Flaherty was "too old and grandmotherly" and embarked on a campaign to have her terminated. Flaherty contends that Hurwitz refused to carry out his orders, however, and was transferred to another division as a result.

In March 1996, Cardonsky succeeded Hurwitz and was given the same directive to terminate Flaherty's employment. At that point, Cardonsky allegedly refused to provide Flaherty with the same level of supervisory support that he gave to similarly situated, male account managers. For example, he supposedly refused to meet with Flaherty's customers, which had an adverse impact on her ability to generate business, but regularly met with the customers of other managers.

At a meeting on August 21, 1996 to discuss her performance, Cardonsky issued Flaherty a warning letter which stated that she would be terminated if she did not meet certain budgetary projections by year's end. In pertinent part, the letter stated:

> The expectation is that you will meet, at a minimum, your total revenue budget for 1996. Failure to perform at this level by year-end could be grounds for separation.

Cardonsky was accompanied at the meeting by a representative of Metromail's Human Resources Department, who allegedly pressured Flaherty to accept a demotion to a lower-paying position in the Catalogue Division, but she refused. Finally, Flaherty says that she found out that on that same day Cardonsky had said to other account managers, "as soon as I can get rid of the old bag, you can have her accounts." Simultaneously, many of Flaherty's key accounts were allegedly offered to Eric Findeissen, a male account executive under the age of 40, but he refused to accept them. Flaherty alleges that she became ill and fainted shortly after learning of these events.

By early 1997, Reynolds and Cardonsky were no longer employed by Metromail. After they departed, Flaherty believed that the warning letter had been withdrawn and that "everything had gone back to normal." James Kaiser replaced Cardonsky. In February 1997, Kaiser failed to reassign a lucrative account to Flaherty and instead assigned it to a younger woman, Elyssa London. For 90 days after his appointment, Kaiser had imposed upon himself a "moratorium" during which time he would not meet with customers. Flaherty contends that, although Kaiser refused to meet with her customers during the moratorium, he did meet with customers of her male peers during the same 90 day period. Flaherty also contends that in May 1997, Kaiser failed to cancel a scheduled meeting with her and simply did not show up. Throughout this period of time, Flaherty continued to experience stress-related symptoms, both physical and emotional, allegedly the result of the discrimination. On May 15, 1997, Flaherty told Kaiser that she was thinking about retirement and asked him to look into a retirement "package," including health benefits. By memorandum to Kaiser dated June 12, 1997, Flaherty submitted her formal retirement, effective November 1st of that year. The memorandum recited her understanding that the notice "meets and exceeds

the 90 day notice requirement" specified by company policy. After June 12, Flaherty continued to perform services for Metromail on an almost daily basis, but with a reduction in her scheduled hours, until the effective date of her retirement.

On February 9, 1998, Flaherty filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), claiming she was constructively discharged from Metromail. Having received notice from the EEOC of her "right to sue" on September 8, 1998, Flaherty filed her original complaint, commencing this action, on December 4, 1998. In her amended complaint, Flaherty sought compensatory and punitive damages and attorneys' fees against Metromail and Experian, asserting claims of gender and age discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., the New York State Human Rights Law, N.Y. Exec. Law § 296, and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107 et seq. Following the service of an amended answer, defendants moved for summary judgment on the grounds that Flaherty's claims were time-barred, that there was no basis for any claim that any alleged adverse employment action was based on age or gender, and that Flaherty failed to meet the standards for constructive discharge.

The district court granted summary judgment for defendants on the ground that Flaherty's cause of action was barred for failure to timely file administrative charges with the EEOC. [n1]The court determined that Flaherty's cause of action accrued no later than August 21, 1996, the date "when she received 'definite notice' of her looming termination." Flaherty v. Metromail, 2000 U.S. Dist. LEXIS 3197, *12, No. 98 Civ. 8611, 2000 WL 288356, at *4 (S.D.N.Y. Mar. 16, 2000). By the time the warning notice was delivered on that date, according to the district court,

> it was clear to her (1) that Cardonsky, her supervisor, would not meet with her clients; (2)

> that she would be terminated if she did not meet certain projections; (3) that as a practical matter, she could not meet those projections because accounts were transferred away from her; and (4) that she was already being pressured to resign as account manager and accept a lower-paying position in the Catalogue Division.

Id. The district court rejected Flaherty's attempt to invoke the "continuing violation exception" to the time-bar and found it unnecessary to determine whether the Experian defendants were liable to Flaherty as successors in interest. Id. at *5. This appeal followed the entry of summary judgment for all defendants.

DISCUSSION

The issue of when a claim for constructive discharge occasioned by unlawful discrimination in employment accrues is one of first impression in this circuit, although in an earlier case we noted that the parties had agreed "that the limitations period in a constructive discharge case accrues upon the date that the employee gives notice of resignation." Peterson v. Insurance Co. of North America, 40 F.3d 26, 29 (2d Cir. 1994). It has long been settled that a claim of employment discrimination accrues for statute of limitations purposes on the date the employee learns of the employer's discriminatory conduct. See Delaware State College v. Ricks, 449 U.S. 250, 258, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980) ("The filing limitations period . . . commenced . . . at the time the tenure decision was made and communicated to [the defendant]."); Cornwell v. Robinson, 23 F.3d 694, 703 (2d Cir. 1994) (employment discrimination claims accrue on the date that the employee "knows or has reason to know of the injury which is the basis of his action").

In Ricks, a college professor claimed that he was denied academic tenure on account of his national origin. See 449 U.S. at 254. Although he contended that his claim accrued at the time of his actual termination of employment a year after tenure was denied, the Supreme Court held that the denial of tenure, the discriminatory act complained of, was the date

the claim accrued. See id. at 258. Termination was the inevitable consequence of the denial of tenure and "the limitations period commenced to run when the tenure decision was made and [the professor] was notified." Id. at 259. The Court cited with approval the holding in a Ninth Circuit tenure case that "'the proper focus is upon the time of the discriminatory acts, not upon the time that the consequences of the acts became most painful.'" Id. (quoting Abramson v. University of Hawaii, 594 F.2d 202, 209 (9th Cir. 1979)).

In discriminatory discharge cases, then, the illegal act is often the decision to terminate the employee, and the limitations period begins to run on the date that the employer gives definite notice of that decision to the employee. See Ricks, 449 U.S. at 258; Chardon v. Fernandez, 454 U.S. 6, 8, 70 L. Ed. 2d 6, 102 S. Ct. 28 (1981). Thus, the time for filing a claim with the EEOC "starts running on the date when the employee receives a definite notice of the termination, not upon his discharge." Miller v. International Tel. & Tel. Corp., 755 F.2d 20, 23 (2d Cir. 1985). Although allegations of unlawful discrimination by employers underlie claims of discriminatory discharge, as well as claims of constructive discharge where an employer gives no notice of termination, the date of accrual of the former must be different from the date of accrual of the latter.

In constructive discharge cases the actionable conduct is not a discrete, identifiable act on the part of the defendant. Rather, "constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily." Chertkova v. Connecticut Gen. Life Ins. Co., 92 F.3d 81, 89 (2d Cir. 1996); see also Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983). A court must find a constructive discharge where the employee resigns because an employer causes to exist conditions of such an unpleasant or difficult nature that any reasonable person in the employee's place would do the same. See Kirsch v. Fleet Street, Ltd., 148 F.3d 149, 161 (2d Cir. 1998). We are mindful that "[a] resignation is not itself a 'discriminatory act' if it is merely the consequence of past

discrimination, but if the employer discriminates against an employee and purposely makes the employee's job conditions so intolerable that a reasonable person would feel forced to resign, then the resignation is a constructive discharge – a distinct discriminatory act for which there is a distinct cause of action." Young v. National Ctr. for Health Servs. Research, 828 F.2d 235, 237-38 (4th Cir. 1987) (internal quotation marks omitted).

Flaherty contends that the intolerable atmosphere that caused her to quit consisted of a series of acts by various of her supervisors that made her work atmosphere intolerable. These included failure to assist her with her accounts, threatening her with termination for failure to meet her budget projections, transferring her accounts to others, and pressuring her to take a lower-paying position. These acts allegedly were motivated by age and sex discrimination, as illustrated by some ageist and sexist remarks purportedly made by Flaherty's supervisors.

The district court determined that Flaherty's cause of action accrued when she had definite notice of her "looming termination." Although that is an especially difficult date to ascertain in this case, the district court did identify the date that Flaherty received the warning letter dated August 21, 1996, as "the latest" date when she had notice of her "looming termination." However, an examination of the letter reveals no definite notice of termination. The letter, handed to Flaherty by Cardonsky, merely refers to the company's "expectation" that Flaherty would "meet, at a minimum, [her] total revenue budget for 1996." Failure to perform, according to the letter, "could be grounds for separation." (Emphasis added.) Cardonsky himself was later fired, the letter was never mentioned again, and Flaherty herself was under the impression that the warning had been withdrawn. Flaherty asserts that a number of acts that occurred after the letter added to the intolerable atmosphere that had been building for some time and that culminated in the submission of her formal notice of retirement on June 12, 1997.

We think that the date that Flaherty's claim accrued was the date when she gave definite notice of her intention to

retire, and the rule should be the same in all cases of constructive discharge. This is essentially the converse of the discriminatory discharge case where the date the employer gives notice of termination to the employee is controlling for purposes of accrual. In the case of constructive discharge, it is only the employee who can know when the atmosphere has been made so intolerable by the discrimination-motivated employer that the employee must leave. In this, we agree with the Ninth Circuit Court of Appeals

> that the date of discharge triggers the limitations period in a constructive discharge case, just as in all other cases of wrongful discharge. Constructive discharge is, indeed, just one form of wrongful discharge. The fact that the actual act of terminating employment is initiated by the employee, who concludes that she is compelled to leave as a result of the employer's actions, rather than by the employer directly does not change the fact that the employee has been discharged.

Draper v. Coeur Rochester, Inc., 147 F.3d 1104, 1110 (9th Cir. 1998).

Although Flaherty met with Kaiser on May 15, 1997 to advise that she was contemplating retirement and to ask about a retirement "package," it was not until June 12, 1997 that she effectively communicated her intention to resign. On that date, she delivered by memorandum a formal statement that she was retiring from her employment at Metromail, effective November 1st. Since that date was within the 300 days of the filing of her complaint with the EEOC, her filing was timely. By this, we express no opinion on the merits of Flaherty's claim of constructive discharge. In view of our determination in this case, it is unnecessary for us to pass on Flaherty's claim that the continuing violation exception would eliminate any time-bar to her constructive discharge cause of action. Finally, we leave it to the district court to determine, in the first instance, whether the Experian entities are proper parties and liable as successors in interest to Metromail.

CONCLUSION

For the foregoing reasons, we vacate the judgment of the district court in its entirety and remand for further proceedings consistent herewith.

Footnotes

* The Honorable Reena Raggi, of the United States District Court for the Eastern District of New York, sitting by designation.

n1 To sustain a claim for unlawful discrimination under Title VII and/or the ADEA, a plaintiff must file administrative charges with the EEOC within 300 days of the alleged discriminatory acts. See 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. § 626(d)(2). Since Flaherty filed her charges of discrimination with the EEOC on February 9, 1998, her cause of action would be time-barred if it accrued at any time prior to April 15, 1997.

98 Civ. 8611 (NLRB)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARY FLAHERTY,
Plaintiff,

v.

METROMAIL CORPORATION, EXPERIAN CORPORATION, EXPERIAN INFORMATION SOLUTIONS, INC., and EXPERIAN HOLDINGS, INC. as successors in interest to METROMAIL CORPORATION,
Defendants.

July 31, 2001, Decided

July 31, 2001, Filed

COUNSEL:
For MARY FLAHERTY, plaintiff: Janet C. Neschis, Steven J. Hyman, McLaughlin & Stern, LLP, New York, NY.

For METROMAIL CORPORATION, EXPERIAN CORPORATION, defendants: Kevin B. Leblang, Kramer, Levin, Naftalis & Frankel LLP, New York, NY.

JUDGES:
NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

OPINIONBY:
NAOMI REICE BUCHWALD

OPINION:

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Plaintiff Mary Flaherty ("Flaherty") brings this action against her former employer, Metromail Corporation ("Metromail"), and its alleged successors in interest, Experian Corporation, Experian Information Solutions, Inc., and Experian Holdings, Inc. (the "Experian entities"), asserting gender and age discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq., the New York State Executive Law, and the New York City Human Rights Law. Now pending is defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons set forth below, defendants' motion is granted.

Background

This case is before us on remand from the Second Circuit after it reversed our March 16, 2000 dismissal of the action on statute of limitations grounds. We assume familiarity with the facts as set forth in our earlier opinion. However, a brief summary of the events leading up to Flaherty's alleged constructive discharge on June 12, 1997 is in order. [n1]

Flaherty began working for Metromail as a secretary in 1977, but in or about 1982, she was made an account manager and full-time sales person in Metromail's East Coast Sales Office. Flaherty claims that she first experienced gender and age discrimination at Metromail when her supervisor, Rick Lane ("Lane"), expressed his sexist and ageist views to her in 1993. [n2] Although Lane left the company that year, Flaherty complains that the discrimination persisted. Sometime in 1995, Senior Vice-President Mike Reynolds ("Reynolds") allegedly told her supervisor, Beth Hurwitz ("Hurwitz"), that Flaherty was "too old and grandmotherly" and, thereafter, sought to terminate her. Flaherty contends that Reynolds transferred Hurwitz to another division when she refused to terminate Flaherty. Sam Cardonsky ("Cardonsky") replaced Hurwitz as Flaherty's supervisor in March of 1996, and also allegedly received orders from Reynolds to fire Flaherty. At that point, Flaherty contends that Cardonsky refused to provide her with the same level of support he gave to

similarly situated male account managers. [n3] However, she admitted that Cardonsky met with at least two of her customers, American Express and National Geographic Broadcast, and that he met with Peterson Publishing, a prospective client, on her behalf. Flaherty Dep. at 120-21. Furthermore, Flaherty testified that other account managers, including Nick Farriella ("Farriella"), a male approximately the same age as Flaherty, complained about not receiving adequate support. Flaherty Dep. at 289.

On August 21, 1996, Flaherty claims that her supervisors took a series of actions that indicated she would be fired. First, Cardonsky met with Flaherty to discuss her performance and issued a warning letter stating that she could be terminated if she failed to meet certain budgetary projections by year's end. [n4] However, she was not the only salesperson to receive such a warning. Farriella received a warning letter for being nearly $ 60,000 under budget, and at least four other salespeople outside of Cardonsky's group but within Reynold's reporting-chain received warnings as well. Second, a representative of Metromail's Human Resources Department accompanied Cardonsky to this meeting and allegedly pressured Flaherty to accept a lower-paying position in the Catalogue Division. However, Cardonsky testified in his deposition that he made the offer to help Flaherty because "this would be a better solution than perhaps losing her job at the end of the year." Cardonsky Dep. at 55. Finally, Flaherty asserts that she also learned on that day that Cardonsky had told other account managers that "as soon as I can get rid of the old bag, you can have her accounts." She alleges that some of her accounts were then offered to Eric Findeissen, a male account executive under the age of 40, but that he declined to accept them. Flaherty claims that as a result of the day's events she became ill and fainted at her home.

By early 1997, both Reynolds and Cardonsky had left Metromail and in February, James Kaiser ("Kaiser") became plaintiff's direct supervisor. Flaherty believed that the warning letter had been withdrawn and "everything had gone back to normal." Flaherty's Dep. at 236-37. She concedes that Kaiser (1) never made any ageist or sexist comments to or

about her, (2) interceded on her behalf to resolve a problem with one of her accounts, and (3) never raised the issue of retirement with her. Nevertheless, she points to four incidents which she alleges, in light of earlier events, made her working environment so intolerable that she was forced to retire.

First, in order to become better acclimated to his new position, Kaiser declared that he would not meet with any customers for 90 days after his appointment. Flaherty contends that although he would not meet with any of her clients, he met with customers of her male peers during this 90-day moratorium. However, her deposition testimony reveals that she merely saw Kaiser leaving the office with other male account managers and that she did not know whether he met with any of their clients. Flaherty's Dep. at 259. [n5] Moreover, Kaiser testified that the sole client he remembered meeting with from January through March was Doubleday, and only after the company demanded an emergency phone call. Kaiser Dep. at 144-45.

Second, Kaiser supposedly told plaintiff that he knew about the warning letter and said, "you are still going to have to prove yourself."

Third, Flaherty claims that Kaiser failed to cancel a scheduled meeting with her and simply "stood her up." However, she admits that she never asked him why he missed the meeting and does not know whether he missed any other appointments that day. Flaherty Dep. at 251, 257. When asked about this incident, Kaiser admitted that he failed to meet with Flaherty, but noted that he had cancelled meetings with other account executives in the past as well. Kaiser Dep. at 150. Furthermore, he testified, "as a sales manager, one of my duties is to prioritize business opportunities, try to trade them off against my internal requirements; and sometimes I cancel a meeting because of that." Id.

Lastly, Flaherty alleges that Kaiser did not reassign to her a lucrative account with Doubleday and, instead, gave it to a younger woman, Elyssa London ("London"). While it is undisputed that Doubleday was dissatisfied with the account

manager's performance and requested a replacement, Kaiser contends that he believed the problem stemmed from Metromail's production area and not the manager. Kaiser Dep. at 159. Nevertheless, he agreed to reassign the account and determined that, despite Flaherty's qualifications, London would be better suited for the position. He testified:

> Meeting with the customer... [and] getting a more-than-thumbnail-sketch understanding of the problems at the end... led me to the conclusion that the personality best suited to handle this highly charged situation was going to be Elyssa London, because I was of the opinion that we had to apply a lot of pressure to the production people, and Elyssa is very strong at being an outstanding customer advocate when a problem occurs and being able to handle that problem amongst the team.

Kaiser Dep. at 162.

Flaherty allegedly continued to experience stress-related symptoms because of the circumstances described above. As a result, she first thought of retiring in March or April of 1997, one or two months after Kaiser's arrival. However, she did not inform anyone of this decision until May 15, 1997, when she told Kaiser that she was considering retirement. He said that he would check into the procedures. The next time Flaherty spoke to anyone at Metromail about leaving the company was in a second meeting with Kaiser on June 15, 1997. [n6] At that point, Kaiser informed her that she had to take her vacation days prior to departure and that company policy usually required 90 days notice before retirement. When questioned about the one-month delay between her initial talk with Kaiser and this second conference, Flaherty testified that, "well, he [Kaiser] was looking into it and he said he would get back to me. So I felt no reason to call him on it." Flaherty's Dep. at 291. Moreover, she stated, "I mean, what – you just have to bear it." Id. There is also no indication in the record that she asked to serve her vacation time and 90 day notice simultaneously. Flaherty continued to perform

services for Metromail on an almost daily basis for the next five and a half months, until the effective date of her retirement on November 1, 1997.

On February 9, 1998, Flaherty filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), claiming she was constructively discharged from Metromail. Having received notice from the EEOC of her "right to sue" on September 8, 1998, she filed her original complaint on December 4, 1998.

In our March 16, 2000 opinion, we ruled that the operative date of Flaherty's constructive discharge for statute of limitations purposes was August 21, 1996, when the alleged discrimination was at its zenith. The Second Circuit reversed this decision, however, explaining that Flaherty's claim accrued on June 12, 1997, the date when Flaherty "gave definite notice of her intention to retire." Flaherty v. Metromail Corporation, 235 F.3d 133, 138 (2d Cir. 2000). The case was then remanded back to this Court for further proceedings. Because we dismissed the case on statute of limitations grounds, we never reached the question of whether Flaherty had proffered sufficient evidence to support her constructive discharge claim. We do so now.

Discussion

A. Summary Judgment Standard

Summary judgment is properly granted where the "'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law.'" R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 57 (2d Cir. 1997) (quoting Fed. R. Civ. P. 56(c)). The Federal Rules of Civil Procedure mandate the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

In reviewing the record, we are required to assess the evidence "in the light most favorable to the non-movant and . . . draw all reasonable inferences in [her] favor." Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174, 177 (2d Cir. 1990). The mere existence, however, of an alleged factual dispute between the parties will not defeat a motion for summary judgment. In order to defeat such a motion, the non-moving party must affirmatively set forth facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). An issue is "genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248 (internal quotation omitted).

In considering defendants' motion for summary judgment, we are mindful that summary judgment is "ordinarily inappropriate" in the context of a workplace discrimination case because the allegations usually require exploration into an employer's true motivation and intent for making a particular employment decision. Patrick v. LeFevre, 745 F.2d 153, 159 (2d Cir. 1984). However, this caution does not absolve the plaintiff from the responsibility of producing sufficient evidence from which a reasonable juror could return a verdict in his or her favor. See Anderson, 477 U.S. at 249-50 (1986). "To allow a party to defeat a motion for summary judgment by offering purely conclusory allegations of discrimination, absent any concrete particulars, would necessitate a trial in all Title VII cases." Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985); see also Lane v. Sotheby Parke Bernet, Inc., 758 F.2d 71, 72 (2d Cir. 1985) (affirming grant of summary judgment in Title VII action where plaintiff failed to establish prima facie case).

B. Constructive Discharge

In order to establish a prima facie case of age or gender discrimination under Title VII or ADEA, a plaintiff must satisfy four elements: (1) that she is a member of a protected class; (2) that she is qualified to hold the position in question; (3) that she suffered an adverse employment action; and (4) that this adverse action occurred under circumstances which

give rise to an inference of discrimination. See McDonnell Douglas v. Green, 411 U.S. 792, 801-04, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); James v. New York Racing Ass'n., 233 F.3d 149, 153-54 (2d Cir. 2000).

It is undisputed that Flaherty has established the first and second elements. First, Flaherty falls within a protected class because she is a female and over the age of forty. Second, she was qualified for the position in question. To meet the third and fourth elements, Flaherty contends that she was constructively discharged under circumstances giving rise to an inference of discrimination.

However, Flaherty has failed to show that she was constructively discharged. [n7] Constructive discharge occurs when an "employer, rather than directly discharging an individual creates an intolerable work atmosphere that forces an employee to quit involuntarily." Chertkova v. Connecticut Gen. Life Ins. Co., 92 F.3d 81, 89 (2d Cir. 1996); see also Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983). "Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Chertkova, 92 F.3d at 89. Although courts must consider cumulatively the conditions and events that allegedly forced a plaintiff to retire, id. at 90, "merely difficult or unpleasant working conditions do not rise to the level of constructive discharge." Viera v. Olsten/Kimberly Quality Care, 63 F. Supp. 2d 413, 418 (S.D.N.Y. 1999).

Drawing all reasonable inferences in favor of Flaherty, no trier of fact could find her "working conditions . . . so difficult or unpleasant that a reasonable person in [her] shoes would have felt compelled to resign." Chertkova, 92 F.3d at 89. First and foremost, Flaherty's lengthy post-notice employment with Metromail belies her contention that her working conditions were "so intolerable" that she was compelled to leave. Flaherty first considered retiring in March or April of 1997 and spoke with Kaiser about this option on May 15, 1997. Thereafter, she formally announced her retirement on June 15, 1997 and continued to work at Metromail on an almost daily basis until November 1, 1997, over five months

later. All told, she worked at Metromail for nearly six months after her alleged constructive discharge.

Flaherty's explanation for her lengthy post-notice tenure rings hollow. She contends that she remained at Metromail for this lengthy period because company policy required her to take her vacation time and to give 90 days notice prior to retirement. However, the documentary evidence she submitted in support of this contention actually only requires that an employee give 60 days notice and asks for 90 days notice "if possible." Flaherty's Ex. S ("Levinson Supplemental Declaration"). Flaherty also presents no evidence that she was unwilling to stay for this 90-day period, that she asked anyone whether she could leave immediately, or that she sought to serve her vacation time and notice simultaneously. Thus, her voluntary service following her alleged "constructive discharge" weighs heavily against finding that she was constructively discharged. See Rodriguez v. Graham-Windham Servs. to Families and Children, 2001 U.S. Dist. LEXIS 362, *20-21, No. 99 Civ. 10447, 2001 WL 46985, at *6 (S.D.N.Y. Jan. 18, 2001) (where plaintiff agreed to work for two weeks beyond the date stated in her letter of resignation, court found "it would be difficult for a reasonable person to accept that an employee would voluntarily agree to work for a longer time in an atmosphere so intolerable that she felt forced to resign.").

Second, the incidents Flaherty cites as evidence of her intolerable work environment simply are insufficient to demonstrate that a reasonable person would have felt compelled to retire. Flaherty's complaints basically boil down to the fact that her supervisor told her that she was expected to make her budgetary projection, missed a single meeting with her, and made a business decision to give a particular account to another female colleague. These acts, singularly or in combination, do not rise to the level of constructive discharge. The Second Circuit has found that it is insufficient for a plaintiff to show that she was dissatisfied with the nature of her assignments or that she received unfair criticism. See Stetson v. NYNEX Serv. Co., 995 F.2d 355, 360 (2d Cir. 1993). In Spence v. Maryland Cas. Co., 995 F.2d 1147, 1149-52 (2d Cir. 1993), the court found no constructive

discharge where plaintiff "was ridiculed by his supervisor, blamed for not knowing about certain changes in company practice of which no one had notified him, harangued by executives, written up and criticized for poor performance, threatened with termination, placed on probation, and suffered high blood pressure as a result of his supervisor's treatment." See also Katz v. Beth Israel Medical Center, 2001 U.S. Dist. LEXIS 29, No. 95 Civ. 7183, 2001 WL 11064, at *12 (S.D.N.Y. Jan. 4, 2001) (no constructive discharge even after accepting plaintiff's allegations that she was given insufficient staff assistance and insufficient staff relief to take breaks, told to retire or work part-time if she did not like the situation, unfairly disciplined five or six times, yelled at and berated by supervisors, and threatened with termination). Flaherty's complaints fall short of the incidents judged inactionable in both Spence and Katz. Moreover, Flaherty's case is certainly a far cry from the abuse the Second Circuit found to constitute constructive discharge in Chertkova, where plaintiff's supervisor: (1) "called [plaintiff] into an office with closed doors and berated and yelled at [her] for hours;" (2) threatened her and attempted to force her to resign by saying, "What do you hope for? Do you think that you can outlive us? There is no chance! You are not going to be here!;" and (3) told her that "she would be fired immediately if, over the course of two years, she did not maintain satisfactory performance levels, demonstrate satisfactory behavior, and improve her listening skills." Id. at 85, 89. Therefore, regardless of the subjective distress these complaints may have caused her, they are plainly insufficient to demonstrate that a reasonable person would have felt compelled to retire in their face.

Third, much of what Flaherty bases her constructive discharge claim upon is conduct which occurred years earlier and involved people who were no longer supervising her at the time of her retirement. Flaherty points to the incident in 1995, when Reynolds allegedly told her supervisor, Hurwitz, that Flaherty was "too old and grandmotherly" and sought to have her terminated. She also relies heavily on her contention that in 1996, Cardonsky refused to provide her with the same level of support as other male account managers, issued her a

warning letter stating that she could be terminated if she failed to meet certain budgetary projections, offered her a lower-paying position, made discriminatory statements, and attempted to transfer some of her accounts to another male manager. While these incidents which precede the commencement of the statute of limitations period may arguably be considered as background, they cannot be considered direct evidence of her constructive discharge claim that her working conditions, at a later time and with another supervisor, were objectively intolerable. Indeed, in remanding this case, the Second Circuit emphasized that "[a] resignation is not itself a 'discriminatory act' if it is merely the consequence of past discrimination," and that evidence of contemporaneous intolerable conditions are necessary to state a claim. Flaherty, 235 F.3d at 138 (citation omitted). This court recently rejected a constructive discharge claim where the plaintiff similarly relied on "several discrete incidents, many of which took place well in the past." Terry v. United States, 2000 U.S. Dist. LEXIS 1748, *37, No. 98 Civ. 8249, 2000 WL 204522, at *12 (S.D.N.Y. Feb. 18, 2000); see also Wilson v. Consolidated Edison Co., 2000 U.S. Dist. LEXIS 3895, *13, No. 96 Civ. 7546, 2000 WL 335733, at *3-4 (S.D.N.Y. Mar. 30, 2000) (App. C.) ("the court notes that many of the alleged incidents occurred well before plaintiff decided to resign, and are therefore not relevant for consideration of a claim of wrongful discharge."). In fact, Flaherty herself testified that after Reynolds and Cardonsky left the company in early 1997, she believed that "everything had gone back to normal." Flaherty Dep. at 236-37.

Fourth, Flaherty does not present any facts that show that Metromail deliberately tried to force her to retire for a discriminatory reason. In order to establish constructive discharge, "not only is it necessary to show intolerable working conditions, but the plaintiff must also allege facts sufficient to prove that these conditions were intentionally created by the employer for the purpose of inducing the employee's resignation or retirement." Victory v. Hewlett-Packard Co., 34 F. Supp. 2d 809, 826 (S.D.N.Y. 1999) (quoting Spence, 995 F.2d at 1156). And, "even if the plaintiff establishes that [she] was constructively discharged . . . [she

must] present evidence demonstrating that this discharge occurred under circumstances giving rise to an inference of discrimination based on his race, color, or national origin as required to establish a prima facie case." Ali v. Bank of New York, 934 F. Supp. 87, 93 (S.D.N.Y. 1996).

Metromail has proffered credible non-discriminatory reasons for the actions and events Flaherty cites in support of her constructive discharge claim, which she is unable to rebut. First, Cardonsky explained that his August 21, 1996 offer of a position in the Catalogue Division was an attempt to save Flaherty's employment, not a demotion. Specifically, he testified that it "would be a better solution than perhaps losing her job at the end of the year." Cardonsky Dep. at 55. Alone, this is not presumptive evidence of discrimination. See Rodriguez, 2001 WL 46985, at *6 (court found no constructive discharge where "rather than fire Ms. Rodriguez [plaintiff] for her perceived failings, G-W [defendant] asked Ms. Rodriguez to accept demotion to a newly created position, for which G-W considered her better suited), see also Roge v. NYP Holdings, Inc., 257 F.3d 164, 2001 U.S. App. LEXIS 15931, 2001 WL 811185, at *6 (2d Cir. 2001) (holding that it is not evidence of discrimination when an employer discharges formally an employee for a pretextual reason "out of sympathy" and in order to protect the employee's benefits package). Second, although Metromail issued Flaherty a warning letter on August 21, 1996, other salespersons received warning letters as well, including, Farriella, a male account executive approximately the same age as Flaherty. Indeed, Flaherty concedes that her total revenues were $ 460,000 under budget, yet she was not terminated or otherwise disciplined by her supervisors. Flaherty Dep. at 142, 154, 236-237. Third, there is simply no evidence that Kaiser ever discriminated against Flaherty based on her age or gender. Flaherty admitted that Kaiser, (1) never made any ageist or sexist comments to or about her, (2) interceded on her behalf to resolve a problem with one of her accounts, and (3) never raised the issue of retirement with her. Although it is undisputed that Kaiser missed a single meeting with Flaherty, he testified that he had cancelled meetings with other account executives and that one of his duties as a

supervisor was to balance business opportunities with internal appointments. Kaiser Dep. at 150. Similarly, Kaiser's deposition reveals that he reassigned the Doubleday account London because he believed that she had more experience resolving problems with Metromail's production area. In response, Flaherty has not presented any evidence which suggests that these business explanations were illegitimate. Thus, Flaherty has failed to meet her burden of proffering evidence sufficient for any rational finder of fact to conclude that Metromail deliberately created intolerable working conditions in an effort to compel her to retire because of her age or gender. [n8]

Conclusion

Accordingly, for the reasons stated above, defendants' motion for summary judgment is granted.

IT IS SO ORDERED

DATED: New York, New York

July 31, 2001

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Footnotes

n1 Unless specifically noted, all facts stated herein are drawn from plaintiff's amended complaint ("Am. Compl.") and the parties' submissions in connection with the present motion. The latter include their statements pursuant to Local Rule 56.1 ("56.1 Stmt"), deposition transcripts, affidavits or declarations, and other exhibits attached thereto.

n2 Flaherty claims that Lane repeatedly told her that: (1) women did not belong in the workplace; (2) women should be "barefoot and pregnant"; and (3) he would never play golf with a woman. He consistently asked Flaherty, then age 55, when she would retire and suggested that she did not need to work because her husband could support her. Thereafter,

Lane transferred several of her largest accounts to male account managers.

n3 Flaherty specifically complains that Cardonsky refused to meet with her customers, but regularly met with the customers of other managers.

n4 In pertinent part, the letter stated: "The expectation is that you will meet, at a minimum, your total revenue budget for 1996. Failure to perform at this level by year-end could be grounds for separation."

n5 At her deposition, Flaherty testified as follows:
Q. Do you know whether he met with customers of other account managers?
A. I know, I saw them going out together with other account managers, yes.
Q. What other account managers did he go out with?
A. Well, just where I could see in my vantage point, Dick Fariella, I know he went out with Cary Zackman and I know he went out with Erik.
Q. And do you know what customers he visited with them?
A. The only one I would think that I would really know would be Cary Zackman because he had Time Life and so it had to be Time Life. But other than that, I don't know.
Q. But do you know whether or not –
A. No.
Q. – he ever went to Time Life?
A. No. That was Carey's big account and I was making an assumption that he went there, but I don't know that for a fact.

n6 Although plaintiff apparently submitted her formal retirement to Kaiser by memorandum dated June 12, 1997, she testified that after her initial meeting with him on May 15, 1997, the next time that she discussed retirement with anybody at the company was at their June 15, 1997 meeting.

n7 Constructive discharge is treated as an adverse employment action. Spence v. Maryland Cas Co., 995 F.2d 1147, 1155 (2d Cir. 1993).

n8 Because we find that Metromail did not constructively discharge Flaherty, we do not reach the issue of successor liability remanded to this Court by the Second Circuit.

No. 01-9003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARY FLAHERTY,
Plaintiff-Appellant,

v.

METROMAIL CORPORATION, EXPERIAN CORPORATION, EXPERIAN INFORMATION SOLUTIONS, INC., and EXPERIAN HOLDINGS, INC., as successors in interest to Metromail Corporation,
Defendants-Appellees.

July 9, 2002, Decided

COUNSEL:
For Appellant: STEVEN J. HYMAN, McLaughlin & Stern, New York, NY.

For Appellees: ROBERT N. HOLTZMAN, Kramer Levin Naftalis & Frankel, New York, NY.

JUDGES:
PRESENT: HON. GUIDO CALABRESI, HON. ROBERT D. SACK, and HON. BARRINGTON D. PARKER, JR., Circuit Judges.

OPINION:

SUMMARY ORDER

UPON DUE CONSIDERATION, it is ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and it hereby is AFFIRMED.

Plaintiff-appellant Mary Flaherty appeals from a judgment of the United States District Court for the Southern District of New York (Buchwald, J.) granting defendants' motion for summary judgment in her action alleging constructive

discharge. Flaherty filed this suit against her former employer, Metromail Corporation ("Metromail"), and its alleged successors in interest, Experian Corporation, Experian Information Solutions, Inc., and Experian Holdings, Inc., asserting age and "gender plus age" discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., the New York State Executive Law, and the New York City Human Rights Law.

Flaherty worked for Metromail, a direct marketing company, from 1977 until her resignation on November 1, 1997. She was 59 years old when she left the company. Sometime in 1982 she was promoted to the position of account sales executive in Metromail's East Coast Sales Office. In her complaint, Flaherty alleged that from 1993 until the end of 1996, her various supervisors engaged in a series of actions which indicated that she would be terminated for discriminatory reasons. These actions included making discriminatory comments about her, transferring accounts away from her, and denying her adequate supervisory support. Although each of these supervisors had left by early 1997, Flaherty further asserts that the discriminatory treatment continued in 1997 under her new supervisor, James Kaiser.

Flaherty concedes that Kaiser never engaged in any expressly discriminatory conduct. She contends, however, that his decision to assign a lucrative account to another sales representative, his alleged unwillingness to provide her with supervisory support, and his decision to continue enforcing the company's new accountability procedures evidenced Kaiser's intention to create such intolerable work conditions that Flaherty would be compelled to leave. Based upon this belief, Flaherty informed Kaiser on May 15, 1997 that she was thinking about retirement and asked him to look into a retirement package, including health benefits. She requested that she be permitted to retire on July 1, 1997. (This would allow her time to transition her accounts.) Kaiser responded to Flaherty on June 15, 1997, explaining that she would have to take her accrued month of vacation time before the effective date of her retirement, and also provide

three months notice before retiring in order to qualify for benefits. By a memorandum dated June 12, 1997, [n1] Flaherty submitted her formal retirement, effective November 1, 1997.

On December 4, 1998, Flaherty filed the present action. The district court granted summary judgment for defendants on the grounds that Flaherty failed to establish that she was constructively discharged and that Flaherty was unable to rebut Metromail's proffer of credible non-discriminatory reasons for Kaiser's actions and for the other events that Flaherty had proffered in support of her constructive discharge claim. Flaherty v. Metromail Corp., 2001 U.S. Dist. LEXIS 10828, 86 Fair Empl. Prac. Cas. (BNA) 984, 2001 WL 868011 (S.D.N.Y. July 31, 2001). The lower court reasoned that the plaintiff did not offer sufficient evidence that her working conditions were so intolerable that a reasonable person in her shoes would have felt compelled to resign.

The court found, first, that her lengthy voluntary post-notice employment belied this contention. The court did not credit her explanation that the delay was caused by the requirement that she take her vacation and give ninety days notice in order to preserve her retirement benefits. Second, the incidents Flaherty cited as evidence of intolerable working conditions were, according to the court, insufficient to demonstrate that a reasonable person would have felt compelled to retire. The court found that Flaherty based her claim, in large part, upon conduct which occurred years earlier and which involved people who were no longer supervising her at the time of her retirement. The court noted that a resignation does not qualify as a constructive discharge if it is the consequence of past discrimination, and, therefore, that evidence of contemporaneous intolerable conditions is necessary to state such a claim. Finally, Flaherty failed to offer facts showing that Kaiser acted with the deliberation required to establish constructive discharge.

On appeal, Flaherty argues that the district court improperly applied the standard for summary judgment. We review a district court's grant of summary motion de novo. Roge v. NYP Holdings, Inc., 257 F.3d 164, 167 (2d Cir. 2001). A motion for summary judgment may not properly be granted

unless "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

To establish a prima facie case for unlawful termination of employment under the ADEA or Title VII, an employee must show: (1) that she was qualified for the job, (2) that she was within the protected group, (3) that she was either actually or constructively discharged, and (4) that the discharge occurred under circumstances giving rise to an inference of age or gender discrimination. Stetson v. NYNEX Serv. Co., 995 F.2d 355, 359 (2d Cir. 1993), Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 37 (2d Cir. 1994). A claim for constructive discharge exists when "an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily. Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 89 (2d Cir. 1996) (internal quotation marks and citation omitted); see Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 73 (2d Cir. 2000).

We reject the district court's reference to Flaherty's continuing to work for several months after giving notice of resignation as sufficient evidence that her working conditions were tolerable and, hence, that summary judgment against her was justified. Flaherty presented enough evidence to raise a jury question as to whether or not she was aware that Metromail's personnel policies, in fact, only required two months notice before retirement in order to qualify for retirement benefits. Flaherty asserts that she delayed the date of her retirement based upon the information she received from Kaiser concerning Metromail's retirement policies. And if her assertion is accepted, as it must be on a motion for summary judgment, her remaining until November 1, 1997 constitutes no real evidence against her. An employee may find conditions unbearable when no relief is in sight, and yet be able to put up with the same conditions when she knows that freedom (through resignation) is at hand. This is especially so when the employee believes that bearing the

intolerable situation for a limited period is essential to qualify for needed benefits.

The question remains, however, whether Flaherty's work environment at the time of her resignation was sufficient evidence to give rise to a prima facie case of constructive discharge. We affirm the dismissal of her complaint on the ground that she fails to raise a disputed issue of material fact regarding the presence of objectively intolerable working conditions deliberately created by her employer at the time of her resignation. Flaherty conceded that, to her knowledge, Kaiser had never made a discriminatory remark to or about her. And the conduct that Flaherty proffers as evidence of Kaiser's deliberate efforts to compel her to resign is inadequate to establish a prima facie case that her work environment was intolerable and that Kaiser was engaged in intentional efforts to compel her to resign. Any past discrimination she allegedly experienced under her earlier supervisors is not, in the particular circumstances of this case, sufficiently linked to working conditions under Kaiser to support a constructive discharge claim, since the earlier supervisors had left the company and no longer dealt either with the plaintiff or with Kaiser.

Having reviewed all of plaintiff's remaining arguments and finding them to be without merit, we AFFIRM the judgment of the district court. [n2]

Footnotes

n1 It is not clear in the record why the letter is dated June 12, 1997 when the conversation with Kaiser did not occur until June 15, 1997.

n2 In view of our affirmance of the district court's treatment of plaintiff's federal claims and the district court's failure to discuss her state claims, these latter should be treated as dismissed without prejudice. See Baylis v. Marriott Corp., 843 F.2d 658, 665 (2d Cir. 1988) ("When all bases for federal jurisdiction have been eliminated from a case so that only pendent state claims remain, the federal court should ordinarily dismiss the state claims.").

98 Civ. 8611 (NRB)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARY FLAHERTY,
Plaintiff,

v.

METROMAIL CORPORATION, EXPERIAN CORPORATION, EXPERIAN INFORMATION SOLUTIONS, INC., and EXPERIAN HOLDINGS, as successors in interest to METROMAIL CORPORATION,
Defendants.

March 15, 2000, Decided

March 16, 2000, Filed

COUNSEL:
For MARY FLAHERTY, plaintiff: Janet C. Neschis, Steven J. Hyman, McLaughlin & Stern, LLP, New York, NY.

For METROMAIL CORPORATION, EXPERIAN CORPORATION, defendants: Kevin B. Leblang, Kramer, Levin, Naftalis & Frankel LLP, New York, NY.

JUDGES:
NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

OPINIONBY:
NAOMI REICE BUCHWALD

OPINION:

OPINION AND ORDER

-NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Plaintiff Mary Flaherty ("plaintiff" or "Flaherty") filed this action against her former employer, Metromail Corporation ("Metromail"), and its alleged successors in interest, Experian Corporation, Experian Information Solutions, Inc., and Experian Holdings, Inc. (the "Experian entities"), asserting gender and age discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq, the New York State Executive Law, and the New York City Human Rights Law. Now pending is defendants' motion, pursuant to Fed. R. Civ. P. 56, for summary judgment. For the reasons set forth below, defendants' motion is granted.

BACKGROUND

Plaintiff, a 61 year old female, worked for Metromail from 1977 until her resignation on November 11, 1997. [n1] Metromail is a direct marketing company that generates and enhances customer lists for its clients and also provides direct mailing services. Flaherty began working for Metromail as secretary to Joseph Dikdan ("Dikdan") but in or about 1982, was made an account manager and full-time sales person in Metromail's East Coast Sales Office.

Throughout her career at Metromail, Flaherty reported to a series of supervisors: (1) Dikdan from 1977 when she was hired until roughly 1990; (2) Rick Lane ("Lane") from 1990 until his departure in 1993; (3) Mac Rodgers ("Rodgers") from 1993 through 1995; (4) Beth Hurwitz ("Hurwitz") from 1995 through the middle of 1996 when Hurwitz was transferred; (5) Sam Cardonsky ("Cardonsky") from mid-1996 until February 1997; and (6) Jim Kaiser ("Kaiser") from February 1997 until plaintiff's resignation in November 1997. Further, Hurwitz and Cardonsky reported to Senior Vice-President Mike Reynolds ("Reynolds") who, as of 1995, is alleged to have commenced a campaign to terminate plaintiff's employment and directed her supervisors to do so.

Flaherty claims she first experienced gender and age discrimination at Metromail in 1993 when Lane, her then

supervisor, allegedly expressed his sexist and ageist views to her. Supposedly, he repeatedly told plaintiff that (1) women did not belong in the workplace; (2) women should be "barefoot and pregnant;" and (3) he would never play golf with a woman. Am. Compl. P 15. He consistently asked her, then age 55, when she would retire and suggested that she did not need to work because her husband could support her. Id. Shortly thereafter, Lane caused several of plaintiff's largest accounts to be transferred to male account managers. Id. at P 16.

Plaintiff alleges that discrimination at Metromail continued after Lane left the company. Sometime in 1995, Senior Vice-President Reynolds supposedly told Hurwitz, plaintiff's supervisor at the time, that plaintiff was "too old and grandmotherly" and embarked on a campaign to have plaintiff terminated. Flaherty Dep., dated May 4, 1999, at 40-42. Plaintiff contends that Hurwitz refused to carry out his orders, however, and was transferred to another division as a result. In March 1996, Cardonsky was brought in as Hurwitz's replacement and given the same directive to terminate Flaherty's employment. At that point, Cardonsky allegedly refused to provide plaintiff with the same level of supervisory support that he gave to similarly situated, male account managers. For example, he supposedly refused to meet with Flaherty's clients, which had an adverse impact on her ability to generate business, but regularly met with the clients of other managers. Am. Compl. P 21; Flaherty Dep. at 122-127.

On August 21, 1996, several months after Cardonsky had withdrawn client support, Flaherty claims her supervisors took a series of actions which indicated that she would be terminated. At a meeting convened to discuss her performance, Cardonsky issued plaintiff a warning letter which stated that she would be terminated if she did not meet certain budgetary projections by year's end. Am. Compl. P 22. Simultaneously however, many of plaintiff's key accounts were allegedly transferred to Eric Findeissen ("Findeissen"), a male account executive under the age of 40, which effectively guaranteed that plaintiff would not be able to meet the projections. See Pl.'s 56.1 Stmnt. P 8; Pl.'s Mem. in Opp'n at 17. Furthermore, Cardonsky was accompanied at the

meeting by a representative of Metromail's Human Resources Department who allegedly pressured plaintiff to accept a demotion, a lower paying position in the Catalogue Division. Am. Compl. P 23; Flaherty Decl., dated December 9, 1999, ("Flaherty Decl.") P 11. Finally, plaintiff found out that on that same day, Cardonsky stated to other account managers, "as soon as I can get rid of the old bag, you can have her accounts." Am. Compl. P 25; Flaherty Dep. at 50-51. As a result of these events, Flaherty became physically ill and fainted. Am. Compl. P 26. [n2]

Despite the fact that Reynolds and Cardonsky left Metromail in early 1997, plaintiff claims the company's discriminatory practices, including its deliberate failure to transfer accounts to her, continued unabated. Am. Compl. PP 29-30; Pl.'s 56.1 Stmnt. P 11. She also continued to experience stress-related symptoms, both physical and emotional, allegedly the result of the discrimination. Id. P 31. Pursuant to Metromail policy, plaintiff consequently gave notice of her resignation on May 15, 1997 and, on November 7, 1997, worked her last day at the company.

On February 9, 1998, Flaherty filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), claiming she was constructively discharged from Metromail. Having received notice from the EEOC of her "right to sue" on September 8, 1998, plaintiff filed her original complaint, commencing this action, on December 4, 1998.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is properly granted "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law.'" R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 57 (2d Cir. 1997) (quoting Fed. R. Civ. P. 56(c)). The Federal Rules of Civil Procedure mandate the entry of summary judgment "against a party who fails to

make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

In reviewing the record, we must assess the evidence "in the light most favorable to the non-movant and . . . draw all reasonable inferences in [her] favor." Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174, 177 (2d Cir. 1990). The mere existence, however, of an alleged factual dispute between the parties will not defeat a motion for summary judgment. In order to defeat such a motion, the non-moving party must affirmatively set forth facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). An issue is "genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248 (internal quotation omitted).

In considering this summary judgment motion, we are mindful that summary judgment is "ordinarily inappropriate" in the context of a workplace discrimination case because the allegations usually require an exploration into an employer's true motivation and intent for making a particular employment decision. Patrick v. LeFevre, 745 F.2d 153, 159 (2d Cir. 1984). At the same time, this caution does not absolve the plaintiff from the responsibility of producing sufficient evidence from which a reasonable juror could return a verdict in his favor. See Anderson, 477 U.S. at 249-50 (1986); Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985) ("To allow a party to defeat a motion for summary judgment by offering purely conclusory allegations of discrimination, absent any concrete particulars, would necessitate a trial in all [discrimination] cases"); see also Lane v. Sotheby Parke Bernet, Inc., 758 F.2d 71, 72 (2d Cir. 1985) (affirming grant of summary judgment in Title VII action where plaintiff failed to establish prima facie case).

B. Timeliness of Plaintiff's Claims

Defendant's contention in making the present motion is that plaintiff's claims are untimely, given that she filed her EEOC complaint on February 9, 1998, more than 300 days after the alleged discrimination. It is well-settled that to sustain a claim of unlawful discrimination in New York, under Title VII and the ADEA, a plaintiff must file administrative charges with the EEOC within 300 days of the alleged discriminatory acts. See 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. § 626(d)(2); Butts v. City of New York Dep't of Housing Preservation and Development, 990 F.2d 1397, 1401 (2d Cir. 1993) (Title VII); Miller v. International Tel. & Tel. Corp., 755 F.2d 20, 23 (2d Cir.), cert. denied, 474 U.S. 851, 88 L. Ed. 2d 122, 106 S. Ct. 148 (1985) (ADEA); Guillaume v. International Service System, Inc., 2000 U.S. Dist. LEXIS 507, *8, 2000 WL 45447, *3 (S.D.N.Y. Jan. 19, 2000) ("When a plaintiff fails to file a timely charge with the EEOC, the claim is time-barred and should be dismissed either for failure to exhaust administrative remedies or as time-barred") (internal citations omitted). Although plaintiff accepts that this rule controls, the parties strongly dispute the date on which the cause of action accrued, and thus, the date on which the 300-day limitations period began to run. While plaintiff claims the action accrued on May 15, 1997, when she gave notice of her resignation, defendants contend it accrued much earlier in time.

In E.E.O.C. v. New York City Health and Hospitals Corp., 1994 U.S. Dist. LEXIS 2264, 1994 WL 68420, *2 (S.D.N.Y. Mar. 2, 1994), a case plaintiff relies on to defeat defendants' timeliness objection, see Pl.'s Mem. in Opp'n at 25, Judge Duffy succinctly stated the rules regarding accrual of discrimination claims:

> A discrimination claim accrues when the plaintiff "knows or has reason to know" of the injury that constitutes the basis of the action. Morse v. University of Vermont, 973 F.2d 122, 125 (2d Cir. 1992). The Supreme Court has held that the proper focus in determining the accrual date of a cause of action for employment discrimination is "the time of the discriminatory acts, not upon the

> time at which the consequences became most painful." Delaware State College v. Ricks, 449 U.S. 250, 258, 66 L. Ed. 2d 431, 101 S. Ct. 498 ... Thus, the last date of employment may not always coincide with the start of the statutory limitation clock. Rather, the limitation period begins to run "on the date when the employee receives a definite notice of the termination." [Miller, 755 F.2d at 23.]

In her complaint, as well as her papers submitted in opposition to defendants' motion, Flaherty alleges that she was constructively discharged by Metromail. Constructive discharge occurs when an employer makes working conditions "so intolerable that [a plaintiff is] forced into involuntary resignation." Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983) (quoting Young v. Southwestern Savings & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975)); Stetson v. Nynex Service Co., 995 F.2d 355, 360 (2d Cir. 1993). As Judge Duffy notes,

> [a] claim of constructive discharge does not fit neatly into the [framework set out by the Supreme Court in Ricks, supra,] because it is difficult to determine when the plaintiff had definite notice of the discriminatory termination. Ricks is, nevertheless, helpful to the extent that it rejects a statute of limitations analysis based on the last date of employment where the alleged discrimination occurred on an earlier date. In a constructive discharge claim, "the last date of employment does not necessarily begin the running of [the] statutory limitation period."

EEOC, 1994 U.S. Dist. LEXIS 2264, *8, 1994 WL 68420, at *3 (quoting O'Malley v. GTE Service Corp., 758 F.2d 818, 820 (2d Cir. 1985)).

Thus, contrary to Flaherty's contention that her cause of action accrued when she gave notice of her resignation, the action accrued when she received "definite notice" of her

looming termination. The Court's role is to determine the point at which Flaherty had such notice, see EEOC, 1994 WL 68420, at *3, and we conclude that the operative date was August 21, 1996.

According to the evidence plaintiff herself has proffered, Flaherty experienced a series of discriminatory acts in 1993, in 1995, in early 1996, and culminating with the events of August 21, 1996. By the latter date, it was clear to her (1) that Cardonsky, her supervisor, would not meet with her clients; (2) that she would be terminated if she did not meet certain projections; (3) that as a practical matter, she could not meet those projections because accounts were transferred away from her; and (4) that she was already being pressured to resign as account manager and accept a lower-paying position in the Catalogue Division. There is also evidence that, around the same time, Flaherty learned of Reynolds' comment to Hurwitz that plaintiff was "too old and grandmotherly" and of his actions against Hurwitz for her failure to terminate plaintiff as directed. And, the fact that plaintiff became physically ill and fainted when she learned of these developments most strikingly evidences her realization that Metromail was bent on terminating her employment.

The facts, as alleged by plaintiff, compel the conclusion that her claim accrued on August 21, 1996, at the latest. We find unpersuasive Flaherty's argument, based on dicta in EEOC, that the resignation date holds "where the date on which plaintiff received definite notice is not altogether clear." EEOC, 1994 U.S. Dist. LEXIS 2264, *10, 1994 WL 68420, at *3. Here, the date plaintiff knew or had reason to know that she would be forced out of her position could not be more clear. [n3]

In sum, Flaherty's cause of action accrued on August 21, 1996 at the latest, but she did not file her EEOC complaint until February 9, 1998, after the 300-day limitations period had run. She has failed, moreover, to make a sufficient showing that her claim accrued at a later time. [n4]

CONCLUSION

For the foregoing reasons, we find plaintiff's cause of action to be time-barred, and thus defendants' motion for summary judgment is granted. The Clerk of the Court is directed to enter judgment for the defendants and close the above captioned case.

IT IS SO ORDERED.

DATED: New York, New York

March 15, 2000

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Footnotes

n1 Unless specifically noted, all facts stated herein are drawn from plaintiff's amended complaint ("Am. Compl.") and her submissions in connection with the present motion. The latter include her statement pursuant to Local Rule 56.1 ("56.1 Stmnt") and deposition transcripts, affidavits or declarations, and other exhibits attached thereto.

n2 Shortly after the August 21, 1996 meeting – though she does not specify the date – Flaherty became aware of Reynolds' earlier comment that she was "too old and grandmotherly" and his directive to Hurwitz and Cardonsky that they terminate her employment. Flaherty Dep. at 40-41; see Pl.'s Mem. in Opp'n at 17. In early 1997, she also found out that Tom Kazmarek ("Kazmarek"), a male employee under 40, had been issued a warning letter similar to the one given her, failed to meet the required projections, but was nevertheless given a promotion. Flaherty Decl. P 12.

n3 Plaintiff's attempt to invoke the "continuing violation" exception to the statutory time bar is similarly unpersuasive, see Pl.'s Mem. in Opp'n at 26, as she has failed to make the requisite showing of a "policy or practice" of discrimination at Metromail, Quinn v. Green Tree Credit Corp., 159 F.3d 759,

766 (2d Cir. 1998). While she does allege that Kaiser, her supervisor in early 1997, refused to transfer accounts to her and to meet with her clients, she does not offer any evidence to suggest that these acts were in any way related to earlier acts of discrimination by her other supervisors. See id. at 765 ("Multiple incidents of discrimination, even similar ones, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation") (citation and internal quotation marks omitted).

n4 Our finding that plaintiff's action is time-barred renders it unnecessary for us to determine whether the Experian entities are proper defendants and liable, as successors in interest, to Metromail. See Pl.'s Mem. in Opp'n at 28-29.

98 Civ. 8611 (NRB)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY FLAHERTY,
Plaintiff,

v.

METROMAIL CORPORATION, EXPERIAN CORPORATION, EXPERIAN INFORMATION SOULTIONS, INC., and EXPERIAN HOLDINGS, as successors in interest to METROMAIL CORPORATION,
Defendants.

OPINION AND ORDER

NAOMI REICEBUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiff Mary Flaherty ("plaintiff" or "Flaherty") filed this action against her former employer, Metromail Corporation ("Metromail"), and its alleged successors in interest, Experian Corporation, Experian Information Solutions, Inc., and Experian Holdings, Inc. (the "Experian entities"), asserting gender and age discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq., the New York State Executive Law, and the New York City Human Rights Law. Now pending is defendants' motion, pursuant to Fed. R. Civ. P. 56, for summary judgment. For the reasons set forth below, defendants' motion is granted.

BACKGROUND

Plaintiff, a 61 year old female, worked for Metromail from 1977 until her resignation on November 11, 1997.fn1 Metromail is a direct marketing company that generates and enhances customer lists for its clients and also provides

direct mailing services. Flaherty began working for Metromail as secretary to Joseph Dikdan ("Dikdan") but in or about 1982, was made an account manager and full-time sales person in Metromail's East Coast Sales Office.

Throughout her career at Metromail, Flaherty reported to a series of supervisors: (1) Dikdan from 1977 when she was hired until roughly 1990; (2) Rick Lane ("Lane") from 1990 until his departure in 1993; (3) Mac Rodgers ("Rodgers") from 1993 through 1995; (4) Beth Hurwitz ("Hurwitz") from 1995 through the middle of 1996 when Hurwitz was transferred; (5) Sam Cardonsky ("Cardonsky") from mid-1996 until February 1997; and (6) Jim Kaiser ("Kaiser") from February 1997 until plaintiff's resignation in November 1997. Further, Hurwitz and Cardonsky reported to Senior Vice-President Mike Reynolds ("Reynolds") who, as of 1995, is alleged to have commenced a campaign to terminate plaintiff's employment and directed her supervisors to do so.

Flaherty claims she first experienced gender and age discrimination at Metromail in 1993 when Lane, her then supervisor, allegedly expressed his sexist and ageist views to her. Supposedly, he repeatedly told plaintiff that (1) women did not belong in the workplace; (2) women should be "barefoot and pregnant;" and (3) he would never play golf with a woman. Am. Compl. ¶ 15. He consistently asked her, then age 55, when she would retire and suggested that she did not need to work because her husband could support her. Id. Shortly thereafter, Lane caused several of plaintiff's largest accounts to be transferred to male account managers. Id. at ¶ 16.

Plaintiff alleges that discrimination at Metromail continued after Lane left the company. Sometime in 1995, Senior Vice President Reynolds supposedly told Hurwitz, plaintiff's supervisor at the time, that plaintiff was "too old and grandmotherly" and embarked on a campaign to have plaintiff terminated. Flaherty Dep., dated May 4, 1999, at 40-42, Plaintiff contends that Hurwitz refused to carry out his orders, however, and was transferred to another division as a

result. In March 1996, Cardonsky was brought in as Hurwitz's replacement and given the same directive to terminate Flaherty's employment. At that point, Cardonsky allegedly refused to provide plaintiff with the same level of supervisory support that he gave to similarly situated, male account managers. For example, he supposedly refused to meet with Flaherty's clients, which had an adverse impact on her ability to generate business, but regularly met with the clients of other managers. Am. Compl. ¶ 21; Flaherty Dep. at 122-127.

On August 21, 1996, several months after Cardonsky had withdrawn client support, Flaherty claims her supervisors took a series of actions which indicated that she would be terminated. At a meeting convened to discuss her performance, Cardonsky issued plaintiff a warning letter which stated that she would be terminated if she did not meet certain budgetary projections by year's end. Am. Compl. ¶ 22. Simultaneously however, many of plaintiff's key accounts were allegedly transferred to Eric Findeissen ("Findeissen"), a male account executive under the age of 40, which effectively guaranteed that plaintiff would not be able to meet the projections. See Pl.'s 56.1 Stmnt. ¶ 8; Pl.'s Mem. in Opp'n. at 17. Furthermore, Cardonsky was accompanied at the meeting by a representative of Metromail's Human Resources Department who allegedly pressured plaintiff to accept a demotion, a lower paying position in the Catalogue Division. Am. Compl. ¶23; Flaherty Decl., dated December 9, 1999, ("Flaherty Decl.") ¶ 11. Finally, plaintiff found out that on that same day, Cardonsky stated to other account managers, "as soon as I can get rid of the old bag, you can have her accounts." Am. Compl. ¶ 25; Flaherty Dep. at 50-51. As a result of these events, Flaherty became physically ill and fainted. Am. Compl. ¶ 26.fn2

Despite the fact that Reynolds and Cardonsky left Metromail in early 1997, plaintiff claims the company's discriminatory practices, including its deliberate failure to transfer accounts to her, continued unabated. Am. Compl. ¶¶ 29-30; Pl.'s 56.1 Stmnt. ¶ 11. She also continued to experience stress-related symptoms, both physical and emotional, allegedly the result

of the discrimination. Id. ¶ 31. Pursuant to Metromail policy, plaintiff consequently gave notice of her resignation on May 15, 1997 and, on November 7, 1997, worked her last day at the company.

On February 9, 1998, Flaherty filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), claiming she was constructively discharged from Metromail. Having received notice from the EEOC of her "right to sue" on September 8, 1998, plaintiff filed her original complaint, commencing this action, on December 4, 1998.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is properly granted " ' the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law.'" R. B. Ventures, Ltd. v. Shane 112 F.3d 54, 57 (2d Cir. 1997) (quoting Fed. R. Civ. P. 56(c)). The Federal Rules of Civil Procedure mandate the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 217, 322 (1986)

In reviewing the record, we must assess the evidence "in the light most favorable to the non-movant and . . . draw all reasonable inferences in [her] favor." Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174, 177 (2d Cir. 1990). The mere existence, however, of an alleged factual dispute between the parties will not defeat a motion for summary judgment. In order to defeat such a motion, the non-moving party must affirmatively set forth facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 256 (1986). An issue is "genuine . . . if the evidence is such that a reasonable jury could return a

verdict for the non-moving party." Id. at 248 (internal quotation omitted).

In considering this summary judgment motion, we are mindful that summary judgment is "ordinarily inappropriate" in the context of a workplace discrimination case because the allegations usually require an exploration into an employer's true motivation and intent for making a particular employment decision. Patrick v. LeFevre, 745 F.2d 153, 159 (2d Cir. 1984) . At the same time, this caution does not absolve the plaintiff from the responsibility of producing sufficient evidence from which a reasonable juror could return a verdict in his favor. See Anderson, 477 U.S. at 249-50 (1986); Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985) ("To allow a party to defeat a motion for summary judgment by offering purely conclusory allegations of discrimination, absent any concrete particulars, would necessitate a trial in all [discrimination] cases"); see also Lane v. Sotheby Parke Bernet, Inc., 758 F.2d 71, 72 (2d Cir. 1985) (affirming grant of summary judgment in Title VII action where plaintiff failed to establish prima facie case).

B. Timeliness of Plaintiff's Claims

Defendants' contention in making the present motion is that plaintiff's claims are untimely, given that she filed her EEOC complaint on February 9, 1998, more than 300 days after the alleged discrimination. It is well-settled that to sustain a claim of unlawful discrimination in New York, under Title VII and the ADEA, a plaintiff must file administrative charges with the EEOC within 300 days of the alleged discriminatory acts. See 42 U.S.C. 2000e-5(e) (1); 29 U.S.C. § 626(d) (2); Buttes v. City of New York Dep't of Housing Preservation and Development, 990 F.2d 1397, 1401 (2d Cir. 1993) (Title VII); Miller v. International Tel. & Tel. Corp., 755 F.2d 20, 23 (2d Cir.), cert. denied, 474 U.S. 851 (1985) (ADEA); Guillaume v. International Service System, Inc.., 2000 WL 45447, *3 (S.D.N.Y. Jan, 19, 2000) ("When a plaintiff fails to file a timely charge with the EEOC, the claim is time-barred and should be dismissed either for failure to exhaust administrative

remedies or as time-barred") (internal citations omitted). Although plaintiff accepts that this rule controls, the parties strongly dispute the date on which the cause of action accrued, and thus, the date on which the 300-day limitations period began to run. While plaintiff claims the action accrued on May 15, 1997, when she gave notice of her resignation, defendants contend it accrued much earlier in time.

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> A discrimination claim accrues when the plaintiff "knows or has reason to know" of the injury that constitutes the basis of the action. Morse v. University of Vermont, 973 F.2d 122, 125 (2d Cir. 1992). The Supreme Court has held that the proper focus in determining the accrual date of a cause of action for employment discrimination is "the time of the discriminatory acts, not upon the time at which the consequences became most painful." Delaware State College v. Ricks, 449 U.S. 250, 258 ... Thus, the last date of employment may not always coincide with the start of the statutory limitation clock. Rather, the limitation period begins to run "on the date when the employee receives a definite notice of the termination." [Miller, 755 F.2d at 23.]

In her complaint, as well as her papers submitted in opposition to defendants' motion, Flaherty alleges that she was constructively discharged by Metromail. Constructive discharge occurs when an employer makes working conditions "so intolerable that [a plaintiff is] forced into involuntary resignation." Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983) (quoting Young v. Southwestern Savings & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975)); Stetson v. Nynex Service Co., 995 F.2d 355, 360 (2d Cir. 1993).

As Judge Duffy notes,

> [a] claim of constructive discharge does not fit neatly into the [framework set out by the Supreme Court in Ricks, supra,] because it is difficult to determine when the plaintiff had definite notice of the discriminatory termination. Ricks is, nevertheless, helpful to the extent that it rejects a statute of limitations analysis based on the last date of employment where the alleged discrimination occurred on an earlier date. In a constructive discharge claim, "the last date of employment does not necessarily begin the running of [the] statutory limitation period."

EEOC, 1994 WL 68420, at *3 (quoting O'Malley v. GTE Service Corp., 758 F.2d. 818, 820 (2d Cir. 1985)).

Thus, contrary to Flaherty's contention that her cause of action accrued when she gave notice of her resignation, the action accrued when she received "definite notice" of her looming termination. The Court's role is to determine the point at which Flaherty had such notice, see EEOC 1994 WL 68420, at *3, and we conclude that the operative date was August 21, 1996.

According to the evidence plaintiff herself has proffered, Flaherty experienced a series of discriminatory acts in 1993, in 1995, in early 1996, and culminating with the events of August 21, 1996. By the latter date, it was clear to her (1) that Cardonsky, her supervisor, would not meet with her clients; (2) that she would be terminated if she did not meet certain projections; (3) that as a practical matter, she could not meet those projections because accounts were transferred away from her; and (4) that she was already being pressured to resign as account manager and accept a lower-paying position in the Catalogue Division. There is also evidence that, around the same time, Flaherty learned of Reynolds' comment to Hurwitz that plaintiff was "too old and grandmotherly" and of his actions against Hurwitz for her

failure to terminate plaintiff as directed. And, the fact that plaintiff became physically ill and fainted when she learned of these developments most strikingly evidences her realization that Metromail was bent on terminating her employment.

The facts, as alleged by plaintiff, compel the conclusion that her claim accrued on August 21, 1996, at the latest. We find unpersuasive Flaherty's argument, based on dicta in EEOC, that the resignation date holds "where the date on which plaintiff received definite notice is not altogether clear." EEOC, 1994 WL 68420, at *3, Here, the date plaintiff knew or had reason to know that she would be forced out of her position could not be more clear.fn3

In sum, Flaherty's cause of action accrued on August 21, 1995 at the latest, but she did not file her EEOC complaint until February 9, 1998, after the 300-day limitations period had run. She has failed, moreover, to make a sufficient showing that her claim accrued at a later time.fn4

CONCLUSION

For the foregoing reasons, we find plaintiff's cause of action to be time-barred, and thus defendants' motion for summary judgment is granted. The Clerk of the court is directed to enter judgment for the defendants and close the above captioned case.

IT IS SO ORDERED.

DATED; New York, New York
March 15, 2000

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Footnotes

fn1 Unless specifically noted, all facts stated herein are

drawn from plaintiff's amended complaint ("Am. Compl.") and her submissions in connection with the present motion. The latter include her statement pursuant to Local Rule 56.1 ("56.1 Stmnt") and deposition transcripts, affidavits or declarations, and other exhibits attached thereto.

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fn3 Plaintiff's attempt to invoke the "continuing violation" exception to the statutory time bar is similarly unpersuasive, Pl.'s Mem. in Opp'n at 26, as she has failed to make the requisite showing of a "policy or practice" of discrimination at Metromail, Quinn v. Green Tree Credit Corp., 159 F.3d 759, 766 (2d Cir. 1998) -While she does allege that Kaiser, her supervisor in early 1997, refused to transfer accounts to her and to meet with her clients, she does not offer any evidence to suggest that these acts were in any way related to earlier acts of discrimination by her other supervisors. See is. at 765 ("[M]ultiple incidents of discrimination, even similar ones, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation") (citation and internal quotation marks omitted).

fn4 Our finding that plaintiff's action is time-barred renders it unnecessary for us to determine whether the Experian entities are proper defendants and liable, as successors in interest, to Metromail. See Pl.'s Mem. in Opp'n at 28-29.

Copies of this Opinion and Order have been mailed on this day to the following:

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SUPREME COURT U.S.
FILED
DEC 27 2002
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No. 02-643

IN THE

Supreme Court of the United States

MARY FLAHERTY,

Petitioner,

v.

METROMAIL CORPORATION, EXPERIAN CORPORATION, EXPERIAN INFORMATION SOLUTIONS, INC., and EXPERIAN HOLDINGS, as successors in interest to METROMAIL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

None of the Respondents has issued shares to the public. No publicly held company owns 10% or more of the stock of any of Respondents.

Respondent Experian Holdings, Inc. is the corporate parent of Respondent Experian Information Solutions, Inc.

Direct Marketing Technology, Inc. is the corporate parent of Respondent Metromail Corporation (now known as Experian Marketing Solutions, Inc.).

Respondent Experian Corporation ceased to exist on December 31, 1999 as a result of a merger into Respondent Experian Information Solutions, Inc.

Experian North America, Inc. is the corporate parent of Respondent Experian Holdings, Inc.

GUS plc, a publicly traded United Kingdom company, is the ultimate corporate parent of Respondents.

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Respondents Metromail Corporation ("Metromail"), Experian Corporation, Experian Information Solutions, Inc. and Experian Holdings, Inc. respectfully submit this brief in opposition to Mary Flaherty's petition for a writ of certiorari. The United States Court of Appeals for the Second Circuit, affirming the decision of the United States District Court for the Southern District of New York, correctly determined that Flaherty had failed to raise a genuine issue of material fact regarding her claim of constructive discharge.

Flaherty fails to raise any constitutional issues or any other compelling reason for her writ of certiorari to be granted. *See* Sup. Ct. R. 10. Flaherty's argument that the standard for a constructive discharge applied by the Second Circuit and other Circuit Courts is stricter than that utilized by other federal appellate courts is not ripe for review, as she failed to contest the applicable standard before the Second Circuit and the precise contours of that court's standard remain unsettled. In any event, the decisions of the District Court and the Second Circuit confirm that Flaherty cannot prevail under the standard applied in *any* of the appellate courts whose standard she seeks to invoke here. Further, despite Flaherty's suggestion to the contrary, the Second Circuit properly applied controlling authorities of this Court concerning the standards governing employment discrimination claims.

While she seeks to frame her Questions Presented as seeking a resolution of conflicting opinions of the courts of appeal, her attack on the decision below distills to a claim that the Second Circuit failed to properly apply the law to the particular facts of this case. In these circumstances, the writ should be denied. *See* Sup. Ct. R. 10.

COUNTERSTATEMENT OF THE CASE

Flaherty, a former account executive of Metromail, makes numerous misstatements and mischaracterizations of the record in an attempt to convince the Court to grant her petition. Respondents are compelled to correct some of the more egregious of Flaherty's misstatements and mischaracterizations of the record below.[1]

In 1996, the Metromail division that reported to Mike Reynolds, the senior vice president ultimately responsible for Flaherty's group and to whom Beth Hurwitz,[2] Sam Cardonsky, and James Kaiser all reported, was underperforming; Reynolds received constant pressure from Metromail's president to improve the sales numbers of this business unit. (JA 211, 238, 274, 287, 291, 303-05). As a result, Reynolds and his management team decided that those account executives who were under budget as of July 31, 1996 and were not forecast to make their budgeted numbers by the end of the year would receive warning letters. (JA 274-77, 294, 306-07, 314-15). The only exceptions were for those employees who had been in their respective positions for only a short period of time. (JA 307-08).

---

1. "JA" references are to the Joint Appendix filed in the Second Circuit below. "Pet. Br." refers to the Petitioner's Petition for Writ of Certiorari. "Pet. App." refers to the Appendix to the Petitioner's Petition for Writ of Certiorari.

2. Flaherty contends that Hurwitz was "transferred to another division" because she would not terminate plaintiff. (Pet. Br. at 3). Flaherty can cite only inadmissible hearsay evidence in support of this contention; indeed, the pages she cites to from her deposition (JA 100-01) contain no evidence – hearsay or otherwise – supporting this allegation. Despite Flaherty's suggestion to the contrary, Hurwitz testified that she was never asked to terminate Flaherty. (JA 250).

Flaherty's actual sales were below her budgeted sales as of July 31, 1996; according to her sales budget report, Flaherty was in excess of $460,000 – or 36% – below budget, and she was not forecast to make budget by the end of the year. (JA 121, 295-97, 319-25). Accordingly, Metromail issued a warning letter to her in August 1996. (JA 100, 121, 325).

Nick Farriella, a male who was approximately the same age as Flaherty and was approximately $60,000 below budget as of July 31, 1996 and not forecast to make budget, also received a warning letter at this time. (JA 123, 326-29). At least four other salespeople outside of Cardonsky's group but within Reynolds' reporting chain also received warning letters; of the six persons in Reynolds' chain of command that received warning letters, four were younger than 40 and four were men. (JA 278-79, 309-11).

Flaherty asserts that Cardonsky failed to transfer accounts to her while he transferred accounts to Farriella and a younger male executive (Cary Zackman). (Pet. Br. at 4). Flaherty does not – and cannot – identify any account that Cardonsky ever took away from her; indeed, Flaherty does not claim that she had any accounts taken from her after the early 1990s and concedes that she recovered from that alleged loss of accounts by 1993. (JA 711-12). Flaherty cannot identify *any* account that was transferred to Farriella during 1996, and she concedes that the transfer of accounts to Farriella would not have affected whether he attained his 1996 budget. (JA 158-61, 164-65, 433). Moreover, Farriella had been removed from several other major accounts, and he thus had time to devote to new accounts. (JA 162-63, 172, 213-217, 735). Cardonsky concluded that Farriella would be a good personality fit with one of these accounts, transferred to Farriella at the beginning

of 1997, and had the ability to "wrestle" the account back from another Metromail facility. (JA 159, 216, 218-19, 222-223-1). With respect to the account transferred to Zackman, Cardonsky testified that he thought Zackman's personality would be a good match with the personalities of the client contacts at this account, and that because this Pennsylvania account required regular attention – up to three visits a month – Zackman, a New Jersey resident, was geographically well-suited for the assignment. (JA 217-18).

Flaherty failed to attain her budgeted sales figures as of December 31, 1996. (JA 155-57, 330-38). Nevertheless, she was not terminated or otherwise disciplined. (JA 128, 167-68).

In a reorganization in December 1996 or January 1997, Reynolds ceased to have authority for Flaherty's division. (JA 288-89, 300-02). Shortly thereafter, Cardonsky took on other responsibilities and Kaiser, who was based in Illinois, became Flaherty's manager.[3] (JA 111, 166, 168, 228-29, 258-

3. Confronted with the utter lack of any wrongdoing to assert against Kaiser, Flaherty seeks to bridge the gap between Reynolds and Kaiser by asserting that Kaiser was a "protégé" of Reynolds (Pet. Br. at 4), but can cite no authority for the theory that when one manager has recruited another manager and the two are friendly (the most that she can allege here), some type of discriminatory chain has been established. It is undisputed that Reynolds ceased to have authority for Flaherty's division before Kaiser became Flaherty's manager and, as of early 1997, had left Metromail.

Flaherty seeks to connect Cardonsky to Kaiser based on alleged conversations between the two at or about the time Kaiser assumed responsibility for the publishing group. Her attempts to ascribe a sinister tone to Kaiser's benign testimony fail; the record reflects (Cont'd)

60). In addition to assuming new duties supervising the publishing group, Kaiser retained supervisory duties over the financial services group. (JA 259-60). As of early 1997, both Cardonsky and Reynolds had left Metromail. (JA 111, 288-90).[4]

Flaherty strongly suggests that these organizational changes significantly improved her working conditions and state of mind. Indeed, she asserts that the warning letter was "withdrawn" and that "when . . . Reynolds left, [she] just assumed that everything was gone [sic] back to normal." (JA 54 ¶ 28, 167-68).

Flaherty's major business disappointment during Kaiser's tenure apparently concerned his decision not to transfer the Doubleday account to her in February 1997. (Pet. Br. at 5). The Doubleday account was instead transferred from Farriella to Elyssa London, a younger female account executive who – as Flaherty concedes – had just lost another

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(Cont'd)
only that Kaiser would have to consider organizational politics in light of the fact that (i) under Reynolds, there were specific review procedures in place to evaluate the account executives in his division; (ii) because of the reorganization in December 1996 or early 1997, Reynolds would no longer have authority for that division; and (iii) Reynolds' procedures would not necessarily be followed by other divisional managers. (JA 510-16).

4. Flaherty claims that Cardonsky was terminated (Pet. Br. at 4), but nothing in the record supports this untrue factual assertion. Below, she cited to a statement in Respondents' answer that "Cardonsky's employment with Metromail was terminated in or about January 1997" (JA 37 ¶ 26), erroneously presuming that his employment was terminated *by Metromail* when, in fact, the answer says no such thing and there is no evidence supporting her assumption.

large account. (JA 173-75, 208). Doubleday had been unhappy with Metromail's service and asked that Farriella be removed from the account. Although Kaiser ultimately deferred to Doubleday's demand that Farriella be removed, Kaiser believed that the problems with the account had arisen in the production process and concluded that the new salesperson should be someone with a record of being able to bring pressure to bear on Metromail's production personnel. Based on his previous experience with London – she had been in his group for some time – Kaiser believed she would be more effective than Flaherty in fighting with the production personnel to ensure that the customer's expectations were met. (JA 268-70, 272-73). London had significant experience, had worked successfully on another large publishing account, and Kaiser was unaware (neither Flaherty nor anyone else told him) that Flaherty apparently had been assigned to the Doubleday account years earlier. (JA 264-73).

Flaherty's allegation that "Kaiser assigned the account to a younger female executive . . . even though both Doubleday and the internal person at Metromail who dealt with the account had requested that Ms. Flaherty be assigned to the account" (Pet. Br. at 5) distorts the record. Doubleday merely "suggested [that Kaiser] might want to consider assigning . . . Flaherty to the account," and there is no evidence it objected when London was assigned. (JA 727). And the person at Metromail who was responsible for the production aspects related to Doubleday told Kaiser that "London was very capable and competent but sometimes difficult to deal with; and she would need [Kaiser's] help if [he] made that decision," and that "she would have no problem if [Kaiser] assigned . . . Flaherty;" indeed, that London would be more effective at bringing pressure on the production people weighed in Kaiser's decision to assign her the account. (JA 267-73).

At the time Kaiser assumed his new duties, he decided and announced that he would not meet with *any* clients – whether they were clients of Flaherty, Farriella, London, or anyone else – during the first ninety days of his tenure as manager of the publishing group. (JA 261-62). The *sole* client meeting he did attend during this period was with Doubleday; advised that the account was in jeopardy, he agreed to meet with the client, with the result that Farriella was taken off the account. (JA 261-62, 265-66, 720-21).

Flaherty asserts that "Kaiser repeatedly failed to meet with one of [her] significant accounts" (Pet. Br. at 5); in fact, the record reflects that this client was the *only* client besides Doubleday that Kaiser attempted to contact during the 90-day period, and that he tried calling "more than one" time, although they never spoke. (JA 185-87, 208, 262, 723-25). Flaherty has no evidence that Kaiser visited clients of any other account executive (other than Doubleday) during this period. (JA 187-88, 208).

Flaherty also asserts that Kaiser "stood her up without cancelling a scheduled meeting" (Pet. Br. at 5); Flaherty, however, has no idea why Kaiser did not show up for their scheduled meeting – she never asked him – and has no idea whether he missed any other appointments that same day with other salespeople. (JA 179-80, 184-85). Kaiser could not recall why he missed the meeting. (JA 263). Further, it is undisputed that Kaiser missed meetings with other people as well. (JA 726).

As Flaherty concedes, Kaiser never made any gender-based or age-based comments to or about her (JA 171, 196-97) and interceded on her behalf with respect to a problem with one of her accounts. (JA 180-81). She makes no claim that Kaiser had ever raised the issue of retirement with her.

Flaherty began to seriously contemplate retirement in March or April 1997, but did not communicate her intentions to Kaiser until May 15, 1997. (JA 176-78, 194, 205, 208). In June, Flaherty confirmed that she would be retiring and selected November 1, 1997 as the effective date for her retirement. (JA 189, 192-93, 206-07, 344). Her last day at Metromail was November 1, 1997. (JA 108, 195, 207, 208).

Thereafter, Flaherty commenced this action against Respondents, asserting that she had been discriminated against on the basis of her age, her gender, and some combination of those two factors, all of which had resulted in the constructive termination of her employment. The District Court initially found her claims untimely and dismissed her action. (Pet. App. at 41a-50a). The Second Circuit reversed that determination and remanded the case to the District Court. (Pet. App. at 1a-10a).

On remand, by opinion and order dated July 31, 2001, the District Court granted Respondents' renewed motion for summary judgment. (Pet. App. 11a-25a). The District Court held that Flaherty failed to demonstrate that she was constructively discharged on the basis of her age or gender, in light of the fact that "*[d]rawing all reasonable inferences in favor of Flaherty, no trier of fact could find her 'working conditions . . . so difficult or unpleasant that a reasonable person in [her] shoes would have felt compelled to resign.*'" (Pet. App. at 18a) (emphasis added) (citing *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 89 (2d Cir. 1996)) (alterations in District Court decision). The District Court cited the following record evidence as compelling its holding: (1) Flaherty conceded that Kaiser "never made any ageist or sexist comments to or about her, . . . interceded on her behalf to resolve a problem with one of her accounts, and . . . never

raised the issue of retirement with her" (Pet. App. 13a-14a); (2) the acts allegedly committed by Kaiser – indicating to Flaherty she was expected to meet her budget, missing a meeting with her, and making a business decision to give the Doubleday account to another female employee (Pet. App. at 19a) – were "plainly insufficient to demonstrate that a reasonable person would have felt compelled to retire in their face" (Pet. App. at 19a-20a); (3) "much of what Flaherty bases her constructive discharge claim upon is conduct which occurred years earlier and involved people who were no longer supervising her at the time of her retirement" (Pet. App. at 20a); (4) the timing of Flaherty's decision to retire and subsequent resignation – she first considered retiring in March or April 1997, spoke with Kaiser about this option on May 15, 1997, formally submitted her resignation approximately a month later in June 1997, yet remained an employee until November 1, 1997 – "belie[d] her contention that her working conditions were 'so intolerable' that she was compelled to leave" (Pet. App. at 18a); and (5) Flaherty failed to present any evidence that Metromail had tried to force her to retire because of her age or gender. (Pet. App. at 21a-23a). The District Court also correctly relied on the record evidence that Kaiser expressed his business judgment that London would be better suited for the Doubleday account, and the fact that Flaherty had not presented any evidence that the proffered reasons for the decision were pretextual. (Pet. App. at 14a-15a, 23a).

The Second Circuit affirmed the District Court's decision. (Pet. App. at 26a-30a). The Second Circuit summarized the numerous reasons for the District Court's decision, recognizing that "*[t]he lower court reasoned that [Flaherty] did not offer sufficient evidence that her working conditions were so intolerable that a reasonable person in*

her shoes would have felt compelled to resign." (Pet. App. at 28a) (emphasis added). In analyzing the propriety of the District Court's decision, the Second Circuit utilized the following standard:

> A claim for constructive discharge exists when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily. *Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.*

(Pet. App. at 29a) (internal quotations omitted) (emphasis added).

Although the Second Circuit rejected the District Court's reliance on the fact that Flaherty continued to work for months after giving notice of resignation as a basis for its holding (Pet. App. at 29a), the Second Circuit affirmed the judgment of the District Court based in large part on the other factors relied upon by the District Court:

> *We affirm the dismissal of her complaint on the ground that she fails to raise a disputed issue of material fact regarding the presence of objectively intolerable working conditions deliberately created by her employer at the time of her resignation.* Flaherty conceded that, to her knowledge, Kaiser had never made a discriminatory remark to or about her. *And the conduct that Flaherty proffers as evidence of Kaiser's deliberate efforts to compel her to resign is inadequate to establish a prima facie*

> *case that her work environment was intolerable* and that Kaiser was engaged in intentional efforts to compel her to resign. Any past discrimination she allegedly experienced under her earlier supervisors is not, in the particular circumstances of this case, sufficiently linked to working conditions under Kaiser to support a constructive discharge claim, since the earlier supervisors had left the company and no longer dealt either with the plaintiff or with Kaiser.

(Pet. App. at 30a) (emphasis added).

REASONS FOR DENYING THE PETITION

Flaherty asserts that (i) the standard used in the Second Circuit concerning claims of constructive discharge – Flaherty alleges that under this standard an employee must prove that a reasonable person would have felt compelled to resign under the circumstances and that the employer deliberately intended to force her resignation – is a minority view in conflict with other appellate courts which require only that a reasonable person would have felt compelled to resign under the circumstances (Pet. Br. at 7-11); and (ii) the Second Circuit required that she proffer direct evidence of Metromail's intent and that this supposed requirement is inconsistent with this Court's precedent. (Pet. Br. at 12-14). Each of these arguments is based upon a misreading of the decision below and is otherwise without merit.

I. FLAHERTY FAILS TO JUSTIFY REVIEW BY THIS COURT OF THE DISMISSAL OF HER CLAIM OF CONSTRUCTIVE DISCHARGE

A. Flaherty's Claims Are Not Ripe for Review Because She Failed to Contest the Applicable Standard Before the Second Circuit and the Second Circuit's Standard Is Unsettled

As an initial matter, Flaherty's argument that the standard for a constructive discharge claim applied in the Second Circuit and certain other courts of appeal is inconsistent with other courts of appeal is not properly before this Court. In her appeal to the Second Circuit, Flaherty agreed with the standard utilized by that court for constructive discharge claims and never raised or suggested that the standard was incorrect or should be modified; she never even asserted that other courts of appeal disagreed with the Second Circuit. She should be barred from presenting these contentions for the first time in her petition to this Court. *See Glover v. United States*, 531 U.S. 198, 205 (2001).

Moreover, although the Second Circuit requires both that a reasonable person in the employee's shoes would have felt compelled to resign and that the employee prove deliberate action by the employer to prove a constructive discharge occurred, the law in the Second Circuit is "unsettled" as to the meaning of "deliberate." *See Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 74 (2d Cir. 2000) (requiring "something beyond mere negligence or ineffectiveness"). At a minimum, Flaherty should have sought to clarify the Second Circuit's standard before seeking to raise the issue to this Court.

B. Flaherty Failed to Present Evidence Sufficient to Support a Finding in Her Favor Under any Standard

In any event, the decisions of the District Court and the Second Circuit confirm that Flaherty cannot prevail on her constructive discharge claim under any standard she seeks to invoke. As Flaherty concedes, all of the federal appellate courts require, at a minimum, that an employee satisfy an objective test requiring that a reasonable person would have felt compelled to resign under the circumstances. (Pet. Br. at 8).[5] As the decisions below make clear, she failed to present evidence sufficient to meet even this more limited standard.

As described above, the District Court ruled that "[d]rawing all reasonable inferences in favor of Flaherty, no trier of fact could find her 'working conditions . . . so difficult or unpleasant that a reasonable person in [her] shoes would have felt compelled to resign.'" (Pet. App. at 18a) (citing *Chertkova*, 92 F.3d at 89 (2d Cir. 1996)) (alterations in District Court decision). Similarly, the court found that "the incidents Flaherty cites as evidence of her intolerable work environment simply are insufficient to demonstrate that a reasonable person would have felt compelled to retire." (Pet. App. at 19a).

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5. Flaherty has misstated the standard applied by the Ninth Circuit. In that court, a plaintiff must also "show some aggravating factors, such as a continuous pattern of discriminatory treatment." *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987) (internal quotations omitted and emphasis in original deleted). *See also Lappin v. Laidlaw Transit Inc.*, 179 F. Supp. 2d 1111, 1127 (N.D. Cal. 2001) (confirming standard applied in Ninth Circuit).

After analyzing the underpinnings of the numerous reasons for the District Court's decision, the Second Circuit affirmed the District Court's decision and, with one exception, substantially adopted the factors underlying the lower court's decision: "We affirm the dismissal of her complaint on the ground that she fails to raise a disputed issue of material fact regarding the presence of objectively intolerable working conditions deliberately created by her employer at the time of her resignation." (Pet. App. at 30a). Indeed, after recognizing that "working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign" (Pet. App. at 29a), the Second Circuit expressly ruled, among other things, that "the conduct that Flaherty proffers as evidence of Kaiser's deliberate efforts to compel her to resign is *inadequate to establish a prima facie case that her work environment was intolerable*." (Pet. App. at 30a) (emphasis added).

The lower courts' dismissal of Flaherty's constructive discharge claim was mandated by the record evidence adduced on summary judgment, which was insufficient to support a finding that an intolerable environment existed at the time Flaherty decided to resign. Indeed, given the timing and nature of her allegations, Flaherty could not deny that her working conditions had not significantly improved under Kaiser in 1997 as compared to August/September 1996 – the time when she claimed most of the alleged discriminatory acts occurred. The warning letter was, according to her, "withdrawn," and she asserted that "when . . . Reynolds left, [she] just assumed that everything was gone [sic] back to normal." (JA 54 ¶ 28, 167-68). Similarly, she conceded that Kaiser never made any gender-based or age-based comments to or about her (JA 171, 196-97), acknowledged that he

interceded on her behalf with respect to a problem with one of her accounts (JA 180-81), and never asserted that Kaiser had ever raised the issue of retirement with her.

Flaherty nonetheless complained below that certain actions allegedly taken by Kaiser were discriminatory: telling her she would have to prove herself and bring up her budget, refusing to attend client meetings during the first ninety days of his tenure with the publishing group, missing a scheduled meeting between the two of them, refusing to meet with American Express, and assigning the Doubleday account to London. (*See* JA 168-70, 174-75, 179, 183-85). But the fact that a new manager told Flaherty she would have to prove herself and bring up her budget neither evidenced discrimination nor supported a claim that her working conditions were made intolerable, especially given her failure to come anywhere close to making her budget for 1996. Similarly, as discussed *supra*, neither (i) the decision not to meet with *any* clients during the first 90 days after he assumed his new duties – he met with Doubleday because he was advised the account was in jeopardy and the only other client he attempted to contact during this 90-day period was Flaherty's; (ii) the missed meeting – Flaherty has no idea why Kaiser did not show up (she never asked him) and has no idea whether he missed any other appointments that same day with other salespeople; (iii) the transfer of the Doubleday account – Kaiser believed London would be more effective than Flaherty in fighting with the production personnel to ensure that the customer's expectations were met; nor (iv) Kaiser's alleged failure to meet with American Express – he tried calling the client more than once, but they never spoke – could support a finding that a reasonable person would have felt compelled to resign.

Decisions from jurisdictions that utilize only a reasonable person test further confirm that Flaherty would not have prevailed in those jurisdictions either. *See, e.g., Hipp v. Liberty National Life Ins. Co.*, 252 F.3d 1208, 1236-37 (constructive discharge claim not supported by the evidence when employee remained at his employer for several months after the allegedly discriminatory confrontations occurred and most of his complaints related to manager's management style), *reh'g and reh'g en banc denied*, 273 F.3d 1118 (11th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002); *Keeler v. Putnam Fiduciary Trust Co.*, 238 F.3d 5, 9-10 (1st Cir. 2001) (affirming grant of summary judgment because "'constructive discharge' usually describes harassment so severe and oppressive that staying on the job while seeking redress is intolerable" and none of the employer's actions reached this magnitude); *Landrau-Romero v. Banco Popular de Puerto Rico*, 212 F.3d 607, 613 (1st Cir. 2000) (dismissal of plaintiff's constructive discharge claim was proper because his "resignation came too late after the offensive conduct to be labeled a constructive discharge" and "a plaintiff [who] does not resign within a reasonable time period after the alleged harassment . . . was not constructively discharged"); *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 857-58 (10th Cir. 2000) (plaintiff's evidence that, among other things, she believed she was being isolated, she was suffering from depression attributed to her working conditions, and employer suggested she might do better in a different department, was insufficient to establish a constructive discharge claim as a matter of law).

Flaherty failed to marshal evidence sufficient to support a finding that her working conditions were so intolerable that a reasonable person would have felt compelled to resign. Because her claim would thus fail under any standard employed by any of the courts of appeal, this case is not appropriate for review by this Court.

II. THE SECOND CIRCUIT PROPERLY APPLIED PRECEDENT OF THIS COURT

Flaherty strangely asserts that the Second Circuit improperly "introduced an additional burden in a constructive discharge case that the plaintiff offer direct evidence of the employer's intent." (Pet. Br. at 12). But nowhere in the Second Circuit's decision does that court state that Flaherty was required to submit "direct evidence" of Metromail's intent, and the Second Circuit neither explicitly nor implicitly required that Flaherty present direct evidence of anything. Rather, the court below properly applied the test articulated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny in ruling that she failed to demonstrate the existence of material issues of fact such that her claim could survive summary judgment.

To analyze employment discrimination cases, the Court has devised a three-step method of proof that relies on presumptions and shifting burdens of production. *See McDonnell Douglas*, 411 U.S. at 801-07. Under *McDonnell Douglas*, a plaintiff has the initial burden of establishing a prima facie case of discrimination. *See Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 142 (2000); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas*, 411 U.S. at 802. To establish a prima facie case, a plaintiff must show that (i) she belongs to a protected class; (ii) was qualified to perform the duties required by the position; and (iii) suffered an adverse employment action (iv) under circumstances giving rise to an inference of discrimination. *See generally Reeves*, 530 U.S. at 142; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *McDonnell Douglas*, 411 U.S. at 802.

The initial burden imposed upon Flaherty by the Second Circuit is identical to that required under *McDonnell Douglas* and its progeny:

> To establish a prima facie case for unlawful termination of employment under the ADEA or Title VII, an employee must show: (1) that she was qualified for the job, (2) that she was within the protected group, (3) that she was either actually or constructively discharged, and (4) that the discharge occurred under circumstances giving rise to an inference of age or gender discrimination.

(Pet. App. at 29a; *see also* Pet. App. at 17a-18a (District Court articulation of *McDonnell Douglas* standard)).

Consistent with this Court's precedent, the Second Circuit required only that Flaherty submit evidence sufficient to support a finding that she had been constructively discharged on the basis of her age and/or gender – a showing that it properly ruled she had failed to make. The issue was not her failure to present "direct evidence" – it was her failure to present *any* evidence sufficient to support a verdict in her favor.

Finally, Flaherty challenges the Second Circuit's application of controlling law concerning the scope of Rule 56 of the Federal Rules of Civil Procedure. (*See* Pet. Br. at 14). Rule 56(c) "mandates the entry of summary judgment . . . against a [non-moving] party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). It is beyond dispute that the Second Circuit's

decision was wholly consistent with Rule 56: "We review a district court's grant of summary judgment de novo. . . . A motion for summary judgment may not properly be granted unless 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" (Pet. App. at 28a-29a (citing Fed. R. Civ. P. 56(c)); *see also* Pet. App. at 16a-17a (District Court discussion of Rule 56)). Because Flaherty cannot contest the Second Circuit's statement of the applicable standard, she is left to argue – having lost the argument twice below – that the court misapplied that standard. But here she fails to justify the granting of the writ, as she is simply wrong – the court's determination was compelled by the lack of evidence supporting her claim – and she fails to proffer a proper justification for granting of the writ. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

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